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of Investor-State Dispute  
Settlement

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## IMPROVING THE SYSTEM OF INVESTOR-STATE DISPUTE SETTLEMENT: AN OVERVIEW

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*The contents benefited from discussions and a variety of perspectives in the Committee on earlier versions. The document as a factual survey, however, does not necessarily reflect the views of the OECD or those of its Member governments. It cannot be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements.*

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# IMPROVING THE SYSTEM OF INVESTOR-STATE DISPUTE SETTLEMENT: AN OVERVIEW

## INTRODUCTION

1. Investor-state dispute settlement mechanisms embodied in most investment treaties provide rights to foreign investors to seek redress for damages arising out of alleged breaches by host governments of investment-related obligations. The system of investment dispute settlement has borrowed its main elements from the system of commercial arbitration despite the fact that investor-state disputes often raise public interest issues which are usually absent from international commercial arbitration. Investor-state arbitration may often call for reconciliation of public international law doctrines with the private legal principles of contract law. This hybrid source of rights is generating new questions and in particular challenges relating to the quality of awards and jurisdictional issues.

2. Investment arbitration has expanded in the past decade thanks in part to the more than 2300 BITs now in force around the world as well as the recently concluded Free Trade Agreements, the NAFTA and other regional and multilateral investment treaties such as the Energy Charter Treaty. As the number of investment agreements has risen, the cases brought to dispute settlement have become increasingly complex too, encompassing multiple contracts and hence multiple parties and issues. The multiplication of investment agreements with investor-state dispute settlement provisions has raised the risk of multiple and conflicting awards, as the same dispute can lead to awards under different treaty regimes, as well as under different contracts. The more options parties have to resolve their international disputes in different fora, the greater the risk of multiple and conflicting awards.

3. Although the experience up to now does not show major inconsistencies among arbitral awards, addressing cross-cutting provisions, some decisions considered inconsistent by certain parties and the evolving landscape in investment arbitration led to discussions within the OECD Investment Committee as well as in the context of the International Centre for the Settlement of Investment Disputes (ICSID) on the possibility of the creation of an appeal mechanism. Discussions on establishing an appeal mechanism were not conclusive at this stage but some ideas emerged for the improvement of the system, in particular by enhancing the uniformity in the review process. Although strengthening of transparency was one of the main measures proposed for the improvement of the system, it will not be discussed in this note since it has been the subject of a stand alone, detailed survey<sup>1</sup> and a public statement by the OECD Investment Committee.

4. The present paper i) deals with issues related to the quality of arbitral awards; ii) examines issues related to multiple and parallel proceedings and explores the merits of consolidation of claims; and iii) deals with challenges of jurisdictional nature. In this examination of issues, some proposals were made for possible improvement of the system of investment arbitration.

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1. See Chapter 1 of *International Investment Law – A Changing Landscape*, a companion volume to *International Investment Perspectives*, OECD 2005.

## I. DEALING WITH ISSUES OF QUALITY OF AWARDS

5. There are a number of procedures addressing the quality of arbitral awards. The main procedure for challenging an award is the procedure to review or set aside the final award. The review, which is different for ICSID Convention and non-ICSID Convention awards, is based on limited grounds and does not have as broad a potential scope as an appeal.

6. Another procedure used to help assure the quality of awards is the independent “scrutiny” of draft awards, before they are final, which is a unique feature of the International Court of Arbitration. It does not correspond to a review but constitutes an additional layer of quality control. It currently applies only to disputes brought under the International Chamber of Commerce, which include also a limited number of investment disputes.

7. This section describes the current system of review for both ICSID and non-ICSID awards, including the discussion on the feasibility of a proposal to create an Additional Annulment Facility in the context of ICSID; summarises the discussion on the feasibility of an appeal mechanism and explores the possibility of the application of the “scrutiny” procedure to investment arbitration outside the ICC.

### I.1. Review of awards: the current system and a proposal

8. Review of arbitral awards is designed to preserve the interests of the Parties. Where a defeated Party is dissatisfied with the arbitral Tribunal’s award, it may seek to set it aside. The possibilities of challenging the award differ according to the system of arbitration chosen by the Parties, institutional or *ad hoc*. Although the ICSID Convention system prevents domestic courts from reviewing any of its decisions, recourse to any other kind of arbitration gives a prominent role to national courts which may have a local bias or be subject to the influence of the host government.

#### A. *The ICSID Convention Arbitration*

9. The ICSID Convention mechanism is self-contained, providing for internal control which includes provisions on the interpretation, revision and annulment of awards. These provisions allow either Party to request a review of the award of an ICSID Tribunal when:

- The dispute concerns the meaning or scope of the award (interpretation of awards by the same or a new tribunal, Article 50 of the Convention).
- New facts have emerged which may affect the award decisively and were unknown to the tribunal and to the party seeking to introduce these facts; the latter’s ignorance was not due to negligence (revision of awards by the same or a new tribunal, Article 51 of the ICSID Convention). The new elements must be ones of fact and not law and the facts must be of such a nature that they would have led to a different decision had they been known to the tribunal.<sup>2</sup>

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2. For a detailed analysis see C. Schreuer “The ICSID Convention: A Commentary”, *Cambridge University Press, ICSID, 2001*.

- Either party can ask for the annulment of the award by a separate *ad hoc* Committee (article 52 of the ICSID Convention). The *ad hoc* Committee can only annul the decision of the Tribunal under one or more of the following narrow grounds:
  - the Tribunal was not properly constituted;
  - the Tribunal has manifestly exceeded its powers;
  - there was corruption on the part of a member of the Tribunal;
  - there has been a serious departure from a fundamental rule of procedure; or
  - the award has failed to state the reasons on which it is based.

10. Eight requests for annulment had been registered with ICSID until 2004.<sup>3</sup> These requests involved *Klöckner v. Cameroon* (twice),<sup>4</sup> *Amco v. Indonesia* (twice),<sup>5</sup> *MINE v. Guinea*,<sup>6</sup> *SPP v. Egypt*,<sup>7</sup> *Wena Hotels v. Egypt*,<sup>8</sup> *Vivendi v. Argentina*.<sup>9</sup> In 2004 and 2005, eight new annulment requests were registered.<sup>10</sup> Annulment of an arbitral award can also lead to submission of the dispute to a new Tribunal. For example, Vivendi has been resubmitted to a new tribunal. Wena Hotels is subject to a request for interpretation.

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3. For a comprehensive analysis on annulment procedures and cases see, *IAI Arbitration Series No 1, "Annulment of ICSID Awards"* (E. Gaillard and Y. Banifatemi eds. 2004).

4. The *ad hoc* Committee annulled the Award on the grounds that the Tribunal had failed in its duty to state the reasons for the award. The dispute was retransmitted to a second Tribunal which rendered a new Award; both Parties asked for its annulment but the second *ad hoc* Committee rejected the requests for annulment. *Klöckner v. Cameroon*, Award, 21 October 1983, 2 ICSID Reports 9. *Klöckner v. Cameroon*, Decisions on Annulment, 3 May 1985, 2 ICSID Reports 95. The second award and the decision of the *ad hoc* committee were unpublished. See C. Schreuer *op. cit. n. 2* pp. 897-98.

5. The *ad hoc* committee annulled the award on the basis of the Tribunal's failure to apply the proper law – which was beyond its jurisdiction *rationae materiae*. *Amco v. Indonesia*, decision on Annulment, 16 May 1986, 1 ICSID Reports 509. The case was retransmitted to a new Tribunal which decided first on Jurisdiction (10 May 1988, 1 ICSID reports 543) and then on the merits (Award, 5 June 1990, 1 ICSID reports 569). Both Parties requested annulment of the second Award which was rejected by a second *ad hoc* committee (unpublished decision). See C. Schreuer *op. cit. n. 2* pp. 900.

6. The *ad hoc* Committee annulled the damages section of the Award because the Tribunal had failed to deal with questions raised by Guinea and this failure might have affected the damages awarded. *MINE v. Guinea*, decision on Annulment, 22 December 1989, 4 ICSID reports 79. After MINE retransmitted the damages question for decision by a new tribunal, the parties reached a settlement by agreement. See C. Schreuer *op. cit. n. 2* pp. 901.

7. This case was settled before the *ad hoc* Committee rendered its decision.

8. The *ad hoc* Committee rejected all three bases for annulment advanced by Egypt: manifest excess of powers, serious departure from a fundamental rule of procedure and the award failed to state the reasons on which it is based. See 41 ILM 933 (2002) and E. Gaillard, *op. cit. n. 3*.

9. The *ad hoc* Committee annulled the tribunal's award on the basis of manifest excess of powers. See E. Gaillard, "Vivendi and Bilateral Investment Treaty Arbitration", *New York law Journal*, 6 February, 2003.

10. *Patrick Mitchell v. Democratic Republic of the Congo* (Case No. ARB/99/7), *Consortium R.F.C.C. v. Kingdom of Morocco* (Case No. ARB/00/6), *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Chile* (Case No. ARB/01/7), *Repsol YPF Ecuador S.A. v. Empresa Estatal Petroleos del Ecuador (Petroecuador)* (Case No. ARB/01/10), *Hussein Nuaman Soufraki v. United Arab Emirates* (Case No. ARB/02/7), *CDC Group plc v. Republic of the Seychelles* (Case No. ARB/02/14), *Joy Mining Machinery Limited v. Arab Republic of Egypt* (Case No. ARB/03/11) and *CMS Gas Transmission Company v. the Argentine Republic* (case No ARB/01/8).

11. The decisions rendered by the *ad hoc* Annulment Committees have usually involved the same grounds: manifest excess of powers, serious departure from a fundamental rule of procedure and failure to state reasons. Despite the criticisms of this procedure after the first few cases, the system seems currently to work well and to meet the satisfaction of most arbitrators and clients.

12. Annulment is different than appeal. This is apparent from Article 53 which provides that the award shall not be subject to any appeal or to any other remedy except those provided for in the Convention. Moreover, it does not extend beyond the closed list of grounds to errors on the merits, i.e. errors of law or fact in the award. The result of a successful annulment procedure is the invalidation of the original decision; in contrast, an appeal may result in the modification of the decision.<sup>11</sup> In theory, an appellate body could substitute its own decision for that of the first tribunal or require that tribunal to rectify its mistakes.

### **B. Non-ICSID Convention arbitration**

13. Where arbitration is not conducted under the ICSID Convention, awards or their enforcement can be challenged under the commercial arbitration framework established by national law, the New York Convention and other relevant treaties. Therefore, the national law at the place of arbitration controls the losing party's request to set aside the award, or as the case may be, to refuse enforcement.

14. National arbitration laws prescribe various grounds on which arbitration awards can be challenged. Most modern arbitration statutes provide a limited list of grounds for review and many follow the 1985 UNCITRAL Model Law on International Commercial Arbitration which generally track the list of grounds for non-enforcement of awards contained in Article V of the New York Convention: 1) incapacity of the parties to enter into the arbitration agreement or invalidity of the arbitration agreement; 2) lack of proper notice to a party or incapacity to present its case; 3) inclusion in the award of matters outside the scope of submission; 4) irregularities in the composition of the tribunal or the arbitral procedure; 5) non-arbitrability of the subject matter and 6) violation of domestic public policy.

15. In practice, the most common grounds found by the courts as a reason for set-aside or non-enforcement, are that arbitrators had decided issues outside the scope of their authority or that the award violates public policy.<sup>12</sup>

16. In most countries, the grounds for vacating arbitral awards are mandatory: the parties cannot contract around them. In some countries however, the grounds for vacating international arbitration awards are default rules, at least for arbitrations involving foreign parties.<sup>13</sup>

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11. See Caron D.D. "Reputation and Reality in the ICSID Annulment Process: Understanding the Distinction between Annulment and Appeal", 7 *ICSID Review-FILJ* 21 (1992).

12. See N. Rubins "Judicial Review of Investment Arbitration Awards" *NAFTA Investment Law and Arbitration*, Todd Weiler, Editor p. 363. Rubins states that "...non-arbitrability of the subject matter and procedural irregularity are grounds for challenge that have yet to appear prominently in cases related to investment arbitration awards but which could find increasing currency should challenges become more common".

13. For example, the Swiss international arbitration law provides: "where none of the parties has its domicile, its habitual residence or a business establishment in Switzerland, they may, by an express statement in the arbitration agreement or by a subsequent agreement in writing, exclude all setting aside proceedings, or they may limit such proceedings to one or several of the grounds listed...", *Swiss Private International Law Act*, Art. 192(1) (December 18, 1987).

17. However, an award set aside or vacated at the place of arbitration could be enforceable under other jurisdictions. Because the New York Convention exception to enforcement based on set aside or *vacatur* at the place of arbitration is worded permissively, some courts have enforced awards that were set aside in foreign courts.<sup>14</sup>

18. While most countries have implemented legislation that limits the grounds on which an award may be set aside, the opportunity remains in some cases to reopen the merits of the case, either by application of a broad arbitration statute or broad interpretation of a narrow one.<sup>15</sup>

### **C. *An Additional Annulment Facility: a proposal***

19. As mentioned above, the self-contained ICSID mechanism provides for Annulment of ICSID awards by *ad hoc* Annulment Committees. This mechanism applies however, only to ICSID awards between Washington Convention Parties (142 today). Any revision of a non-ICSID award, e.g., an award under the ICSID Additional Facility Rules or under the UNCITRAL Rules, is in the hands of national courts under national arbitration laws and the New York Convention provisions.

20. For countries which are not Parties to the Washington Convention, ICSID provides for Additional Facility Rules which authorise the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention. These are (i) fact-finding proceedings; (ii) conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; and (iii) conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction. These Rules have been adopted by the Administrative Council.

21. By adopting and applying these Additional Facility Rules, ICSID has created a certain form of uniformity at least in the administration of disputes handled by the Centre. One proposal would be to extend this uniformity at the review level by creating an Additional Annulment Facility that could be used as an adjunct to whatever arbitration rules are applicable.<sup>16</sup>

22. By doing so, non-ICSID members would also have access to the self-contained ICSID system of Annulment and any request for review would be submitted to an *ad hoc* Annulment Committee instead of national courts. Hence, it may limit the number of cases submitted for review to national courts and could serve one of the main purposes of investment arbitration: investor-State disputes would

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14. For instance, France does not consider set aside abroad when deciding to grant or refuse recognition and enforcement of a foreign arbitral award; this approach emphasises the parties' agreement by focusing on the arbitration award; *Article 1502 of the New Code of Civil Procedure*. An illustration of this is the case *Hilmarton Limited v. Omnium de Traitement et de Valorisation*, Decision No 484, French Cour de cassation, First Civil Chamber (1994). A similar approach was taken by the US District Court for the District of Columbia in the case *Chromalloy Aeroservices Inc v. Arab Republic of Egypt*, 939 F. Supp. 907 (D.D.C.) 1996.

15. Some attorneys who have represented claimants in investment arbitration have suggested that in cases where public policy issues and pressure can be great, national courts may be more inclined to overturn the arbitrators' substantive decisions. See Rubins *op. cit. n. 12 p. 361*.

16. Idea proposed by Jan Paulsson, head of the public international law group and the international arbitration group of the Law offices of *Freshfields, Bruckhaus, Deringer*, in the Investment Committee's consultation with BIAC, TUAC and NGOs in December 2004.



be resolved all way by means of mechanisms governed by international standards and procedures rather than these of the host State and its domestic courts.

23. This proposal has been seen as an interesting way to achieve some of the quality control sought by the proponents of an appeals mechanism, though with considerably narrower scope. It remains however an open question whether creation of such an Additional Annulment Facility could be accomplished simply by the drafting of rules that would be adopted by ICSID's Administrative Council. It would also need to be examined whether an arbitral award under such rules be effectively shielded from set-aside or annulment procedures under the arbitral law of the seat of the arbitration without some provision being made in the domestic arbitration law, e.g. pursuant to a treaty.

24. This proposal raises a number of other questions. What would be the case for example of awards issued under NAFTA which in its Article 1136 explicitly contemplates set aside proceedings under domestic law? Could the Additional Annulment Facility be made the exclusive annulment option for arbitration under the Additional Facility Rules and if so, would this be only with regard to future consent to arbitration under these Rules or should the possibility be explored of extending it to existing consents? An option would be the drafting of an optional set of rules requiring other statutory, treaty-or contractual based demonstrations of consent.

25. Members of the Investment Committee discussed this proposal and considered that, because of all the questions rose above as well as the limited need for reforming the existing system this was not, at this stage, a desirable improvement measure.

## **1.2. The discussion on an appeals mechanism**

26. One of the advantages of investment arbitration for foreign investors are that investor-State disputes are resolved by means of mechanisms governed by international standards and procedures and do not rely on standards of the host State and the domestic courts. The finality of arbitration proceedings, i.e., that an arbitration award is binding and not subject to appeal on the merits, has generally been seen as an advantage over judicial settlement.

27. There is a view, however, that though finality is one of the main advantages of international arbitration – for the savings it brings in costs and time – it may sometime come at the risk of having to live with flawed or inconsistent awards on the same or very similar questions or facts. Discussion on the possibility of appeal for investment disputes started among scholars as far back as the early 90s<sup>17</sup> while the first discussion at the governmental level took place during the MAI negotiations.<sup>18</sup> Some countries

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17. See E. Lauterpacht "Aspects of the Administration of International Justice" 1991; S. Schwebel "The Creation and Operation of an International Court of Arbitral Awards", in *The Internationalisation of International Arbitration*, Hunter, M. Mariott, A., Veeder, V.V. eds.115 (1995).

18. At a High Level Meeting in February 1998, one delegation proposed the establishment of an appeal mechanism in the MAI for both State-State and investor-State dispute settlement. In informal consultations, delegations broadly agreed with the objectives of ensuring the development of a coherent jurisprudence and permitting an appeal where there may have been an error in law – particularly concerning the interpretation of MAI obligations. However, concerns were expressed about the delays and costs that might be engendered by adding an appeal and departing for investor-State arbitration from the traditional philosophy of fast, inexpensive and final one step arbitration. As an alternative, it was proposed and accepted that the MAI dispute settlement mechanism would initially remain drafted as final and binding, but it would be made subject to review of practical experience in five years from signature of the MAI. If, as a result of that review, the Contracting Parties considered it advisable to introduce an appeals body, this could be done by amending the Agreement. "*Selected Issues on Dispute Settlement*" (Note by the Chairman) DAF/MAI(98)12, 13 March 1998.

have recently decided to develop an appeal mechanism for investment disputes and have inserted specific provisions regarding such a mechanism in their investment agreements. By mid-2005, several countries have signed treaties with provisions concerning an appeal mechanism.<sup>19</sup>

28. As a result, governments and legal experts have debated its possible advantages and disadvantages in investor-state arbitration. The OECD Investment Committee and ICSID held a joint meeting of legal experts in order to get the reaction of arbitrators on this issue. The discussions focused on i) developments with respect to the creation of an appeal mechanism and the possible consequences, if any, for the OECD member countries and ii) the rationale for creating such a mechanism, i.e. its advantages and disadvantages.

***A. Developments regarding an appeal mechanism in new investment agreements and their possible consequences***

29. The US Trade Act of 2002, which granted trade promotion authority to the Executive Branch of the US Government<sup>20</sup> and has been the basis for the conclusion of several recent US Free Trade Agreements, set down a number of objectives with respect to foreign investment.<sup>21</sup> These included a negotiating objective of an appellate mechanism for investment disputes under free trade agreements.<sup>22</sup> “...providing for an appellate body or similar mechanism to provide coherence to the interpretations of investment provisions in trade agreements...”

30. As a result of this Act, the following specific language on an appellate mechanism was inserted in the recent US Free Trade Agreements with Chile,<sup>23</sup> Singapore<sup>24</sup> and Morocco,<sup>25</sup> and the 2004 U.S. Model BIT.<sup>26</sup>

*Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article ... in arbitrations commenced after they establish the appellate body or similar mechanism.*

31. More recently, the language of the US-Dominican Republic-Central America FTA,<sup>27</sup> – the U.S. FTA with five Central American countries and the Dominican Republic – sets out a very specific

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19. “Possible Improvements of the Framework for ICSID Arbitration”, ICSID, 22 October 2004

20. “This trade authority, formerly known as “fast-track”, allows the Executive Branch to present trade agreements to Congress for approval by a yes-or no vote by a simple majority”. See B. Legum “The Introduction of an Appellate Mechanism: the US Trade Act of 2002”, In *Annulment of ICSID Awards*, see *op. cit. n. 3* p. 289-313.

21. 19 U.S.C. § 3802(b)(3).

22. See B. Legum *op. cit. n. 20*; 19 U.S.C. § 3802(b)(3)(G)(iv).

23. Annex 10-H. The US-Chile Free Trade Agreement was signed on June 6, 2003.

24. Letter exchange, US Trade Representative R. Zoellick to Singapore Minister of Trade and Industry, G. Yeo on May 6, 2003. The US-Singapore Free Trade Agreement was concluded on January 15, 2003.

25. Annex 10-D. The US-Morocco Free Trade agreement was signed on June 15, 2004.

26. Annex D. For the text of the 2004 U.S. Model BIT see <http://www.state.gov/documents/organization/38710.pdf> Annex D.

27. Annex 10-F. The Dominican Republic – Central America – United States Free Trade Agreement was signed on August 5, 2004, but is not yet in force. The Central American countries are: Costa Rica, El Salvador, Guatemala, Honduras, and Nicaragua.

schedule for establishing a Negotiating Group to advance the development of an appellate body, and a number of issues to be considered:

*“Within three months of the date of entry into force of this Agreement, the Commission shall establish a Negotiating Group to develop an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Agreement. The Commission shall direct the Negotiating Group to take into account the following issues, among others:*

- (a) the nature and composition of an appellate body or similar mechanism;*
- (b) the applicable scope and standard of review;*
- (c) transparency of proceedings of an appellate body or similar mechanism;*
- (d) the effect of decisions by an appellate body or similar mechanism;*
- (e) the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 10.16 and 10.25; and*
- (f) the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.*

*The Commission shall direct the Negotiating Group to provide to the Commission, within one year of establishment of the Negotiating Group, a draft amendment to the Agreement that establishes an appellate body or similar mechanism. On approval of the draft amendment by the Parties, in accordance with Article 22.2 (Amendments), the Agreement shall be so amended”.*

32. Any future decisions by the parties to such agreements to establish such an appellate body or similar mechanism would mean in practice the creation of an ad hoc appeal tribunal under each such treaty. Alternatively, one single, preferably institutionally-managed and widely-accepted appeals mechanism could be created. Concerned with a risk of fragmentation of the dispute settlement system that could ensue under the first scenario and may itself affect the consistency of law, ICSID had offered some ideas on the creation of an optional ICSID Appeals Facility, established and operated under a set of Appeals Facility Rules.

33. It is possible that some appeal mechanism on investment disputes may become operational within a short period of time. Although only a few countries are currently addressing the idea of an appellate mechanism in their agreements, their actions may have implications for others. Such implications may increase if an appellate mechanism becomes a reality and begins to issue decisions. The decisions of such an appeal body would have legal implications and an influence on the traditional case law; they could create precedents. There could be perceptions that these are higher level tribunals whose decisions should have a higher precedential value, although in essence they will be issued from the same legal community as the first instance arbitral tribunals. They could also have political implications, since the availability of such a mechanism in some countries could encourage constituencies in other countries to ask forcefully for such a mechanism in their own agreements.

34. There has been also a concern that certain Most Favoured Nation clauses might bring an appeal mechanism into play under treaties that had not envisaged appeal. The parties to existing and new BITs

will therefore need to consider the potential interaction between their investment agreements and any future appellate mechanism to which they may decide to subscribe.

35. The experts consulted were overwhelmingly of the view that, even though they were not all convinced of the objective necessity of an appeals mechanism for investor-state awards, if some countries were ready to establish one, it would be better by far to have a single mechanism.

#### ***B. Why an appeal mechanism in investment disputes? Advantages and disadvantages***

36. There was a vivid discussion among the legal community over the advantages and disadvantages of an appellate mechanism. It is however difficult to dissociate the rationale for appeal from the approach to be taken *vis-à-vis* the specific modalities of such an appeal mechanism.

##### *i) Advantages*

37. The main advantages put forward in discussions were consistency, the possibility of rectification of legal errors and, possibly serious errors of fact, the fact that the review would be confined to a neutral tribunal instead of national courts and that it would enhance effective enforcement.

- Consistency

38. One of the main advantages for the creation of an appellate mechanism advanced by its proponents is consistency. Consistency and coherence of jurisprudence create predictability and enhance the legitimacy of the system of investment arbitration. The inconsistent decisions based on the same or similar facts rendered for instance in the *CME v Czech Republic*<sup>28</sup> and *Lauder v Czech Republic*<sup>29</sup> cases have attracted widespread attention. While there is no guarantee that the inconsistencies would have been avoided if these awards had been submitted subsequently to an appeal, the chances for consistency would be reinforced by the existence of a common appeals body which would handle not only ICSID awards, but also UNCITRAL awards and awards rendered by ICC, SCC and other *ad hoc* arbitral tribunals.

39. The notion of consistency has been viewed to go beyond the situation when two panels constituted under different agreements deal with the same set of facts and give conflicting opinions or reach a different conclusion. It might also encompass coherence of interpretation of basic principles which may underlie differently worded provisions in particular agreements and therefore might enhance the development of a more consistent international investment law. However, it was also pointed out that one needs to approach the question of consistency with some caution and clarity in terms of one's objectives. For example, the discussions in the OECD Investment Committee on the substantive obligations in investment agreements has revealed that countries' intent with respect to the interpretation of a similar provision in their investment agreements may differ in some respects. Thus, the development of consistent international legal principles needs to be balanced by respect for the intent of the parties to specific agreements. Even where the intent of the countries may differ in some respects in relation to similar provisions in their investment agreements, it was argued that, there is value in encouraging consistency in interpretation across the agreements of a particular country or countries where the intent of the parties do not differ.

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28. *CME Czech Republic B.V. v. Czech Republic*, Partial Award (September 13, 2001), available at <http://mfcz.cz/Arbitraz/en/PartialAward.doc>.

29. *Lauder v. Czech Republic* (Final Award) (September 3, 2002) available at [www.mfcz.cz/scripts/hpe/default.asp](http://www.mfcz.cz/scripts/hpe/default.asp)

40. Finally, an appellate mechanism could provide a more uniform and coherent means for challenging awards if traditional bases for annulment were incorporated and it became the exclusive means to challenge an award.

- Rectification of legal errors and possibly serious errors of fact

41. Another possible advantage is to allay public concern that awards affecting important public policy issues and interests could be enforced despite serious error. This could enhance support for investor-state arbitration at a time of growing numbers of cases.

- Review confined to a neutral tribunal versus national courts

42. While arbitral awards may not be appealed on the merits under the current arbitration system, the system reserves a limited but real role for national courts in reviewing the non-ICSID awards. There was some concern that, in some instances, national courts are exceeding their authority to review awards, thereby compromising a central advantage of international arbitration.

43. The creation of an appeal mechanism would uphold the principal advantage of investor-state dispute settlement: the review of investment awards, in particular those outside the ICSID system, i.e. under UNCITRAL and the ICSID Additional Facility Rules, would be confined to neutral and qualified tribunals which would operate on the basis of international standards and procedures instead of taking place in domestic courts which may have a local bias or be subject to governmental influences.

- Effective enforcement

44. Under the current system, for ICSID awards there is a treaty obligation to recognise, which extends to the entire award<sup>30</sup> and an obligation to enforce,<sup>31</sup> which extends only to the pecuniary obligations imposed by the award. The enforcement provision is a distinctive feature of the ICSID Convention. Most other instruments governing international adjudication do not cover enforcement but leave the issue to domestic laws or applicable treaties.<sup>32</sup> Therefore, non-ICSID awards are enforceable under the normal rules governing the recognition and enforcement of arbitral awards established by national law, the New York Convention and other relevant treaties, which give the principal role to domestic courts. Under the New York Convention, the national court could refuse to honour an award.<sup>33</sup>

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30. It does not extend to any other obligation under the award, such as restitution or other forms of specific performance or an injunction to desist from a certain course of action. According to Schreuer, “it is conceivable, although not likely, that a non-pecuniary obligation imposed by an ICSID award may be enforced on a different legal basis –under the New York Convention, for instance”. Christoph H. Schreuer, “The ICSID Convention: A Commentary”, see *op. cit. n. 2* p.p. 1124, 1126.

31. According to Article 54(1) of the ICSID Convention:

“Each Contracting State shall recognise an award rendered pursuant to this Convention as binding and shall enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgement of a court in that State...”

32. NAFTA Article 1136(3)(b) expressly provides for the possibility of actions in national courts to “revise, set aside or annul” awards, requiring the winning party to refrain from enforcement until the losing side has had the opportunity to pursue such relief.

33. The New York Convention requires contracting states to “recognise arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon”. Article V sets out limited grounds on which recognition and enforcement of the award may be refused. See *op. cit. paragraphs 12-17*.

45. In the discussions on creating an appellate mechanism, it was suggested that this might enhance the expeditious and effective enforcement of awards if a respondent that appealed were required to post a bond in the amount of the award and if appeal decisions were excluded from domestic court review.

*ii) Disadvantages*

46. The main disadvantages discussed were that an appeal would go against the principle of finality, would bring additional delays, costs and caseload and lead to the politicisation of the system.

- Against the principle of finality

47. The finality of arbitration proceedings, i.e., that an arbitration award is binding and not open to appeal on the merits, has generally been seen as one of the major advantages of arbitration over judicial settlement. The “final” award puts an end to the parties’ conflict and related dispute settlement expenses in a limited period of time.

48. To the extent the appeal mechanism expands the grounds currently available for annulment or set aside of an award, it would compromise the finality of arbitration. However, there was a view that investment arbitration involves issues of public interest which make the acceptance of the risk of flawed or erroneous decisions less justifiable in the name of finality than it may be in traditional commercial arbitration.

- Additional delays and costs

49. The existence of an appeal mechanism could result in additional costs and delays in the resolution process. With respect to delays, however, there was a view that there are already considerable delays in the set aside proceedings under the national court systems which given the existence of different layers of appeal (first instance, appeal court, supreme courts), could take years before a final decision is rendered.

50. It was also proposed that this potential problem could be limited by setting specific time limits in the appellate process.

51. Another aspect affecting the potential delay and cost of an appeal mechanism was the scope of the review. It was the clear consensus of nearly all the experts that an appeal limited to pure questions of law and excluding review for even serious error of fact would be less potentially costly and time consuming.

- Additional caseload

52. By including additional grounds to the ones under the current annulment and review procedures, an appeal in investment disputes could result in a greater number of challenges to arbitral awards. There was a concern that there would be a tendency to appeal in every case, which would result in decreasing confidence in the main body of decisions and the authority of the “first instance” arbitrators.

53. On this point, it was argued that it might be possible to negotiate a balance of disincentives to appeal such as the requirement of the deposit of a bond to secure the award or the costs of the proceedings which would discourage routine resort to appeal.

- Politicisation of the system

54. There was a concern that the de-politicisation of investment disputes, considered one of the main achievements of investor-to-state arbitration, could be undermined. There was a view that governments, to please to their constituencies, are likely to appeal on every case they lose in the first instance and they would be the main beneficiaries of the system. In addition, it was argued that if the choice of appellate arbitrators is made by the states only, there is a risk of bias against investors.

55. However, a number of arguments have been advanced about the benefits investors could draw from the creation of an appeals mechanism. First, statistically investors lose at least as often as governments, so they would have at least the same opportunity to appeal. Second, the posting of a bond would provide a security for the investor of the amount of the award rendered, which, as noted, can be of particular significance for non-ICSID arbitration. Finally, it was proposed that different solutions could be envisaged for the choice of arbitrators so to ensure neutrality of the system.

56. The review of the advantages and disadvantages produced no consensus among the consultation participants and in the OECD Investment Committee discussions on the merits of adding an appeal to the investor-state dispute settlement system. Considering the ICSID proposal on this matter, its Administrative Council and most of those who offered comments, expressed the view that it would be premature to attempt to establish such an ICSID mechanism at this stage, particularly in view of the difficult technical and policy issues raised. The ICSID Secretariat, will continue however to study such issues to assist member countries when and if it is decided to proceed towards the establishment of an ICSID appeal mechanism.<sup>34</sup>

### **I.3. Scrutiny of awards**

57. Under most rules for investment arbitration, there is no layer of quality control of the award until the final award has been issued and may then be subject to the review procedure – either set aside by national courts or the ICSID Annulment procedure. In the context of international commercial arbitration, the ICC International Court of Arbitration Rules provide for a unique feature of quality control named “scrutiny of awards by the Court”. In the investor-state dispute settlement context, a somewhat similar procedure was introduced by the United States in its model BIT and in the investment chapters of its recent FTAs.

#### **A. The ICC Court of Arbitration Procedure**

58. This mechanism constitutes one of the essential features of ICC arbitration procedure and is appreciated by most ICC arbitration users, including arbitrators.<sup>35</sup>

59. Article 27 of the Rules reads:

#### ***“Scrutiny of the Award by the Court***

*Before signing any Award, the Arbitral Tribunal shall submit it in draft form to the Court. The Court may lay down modifications as to the form of the Award and, without affecting the Arbitral Tribunal’s liberty of decision, may also draw its attention to points of substance. No*

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34. See “Suggested changes to the ICSID Rules and Regulations”, page 4, *Working Paper of the ICSID Secretariat, May 12, 2005*. <http://www.worldbank.org/icsid/052405-sgmanual.pdf>.

35. It is worth mentioning that the French Courts of Appeal, which are faced with a considerable number of set aside awards, consider the ICC awards of a very high quality because of the scrutiny procedure.

*Award shall be rendered by the Arbitral Tribunal until it has been approved by the Court as to its form”.*

Article 6 of Appendix II to the Rules reads:

***“Scrutiny of Arbitral Awards***

*When the Court scrutinises draft Awards in accordance with Article 27 of the Rules, it considers, to the extent practicable, the requirements of mandatory law at the place of arbitration”.*

*The procedure*

60. The purpose of the scrutiny is to avoid the risk of an ICC award containing a serious formal defect. The Court checks whether the draft award rules on all the claims, includes an operative part, and gives all the reasons for the arbitral tribunal’s decisions.<sup>36</sup>

61. The first step is submission by the Tribunal of a draft award to the Counsel in charge of supervising the arbitration within the Secretariat of the Court.<sup>37</sup> After studying the proposed draft the Counsel discusses some of the points with the president of the arbitral tribunal, who decides whether any changes should be made before the draft award is submitted to the Court. The Counsel then prepares a written report describing the arbitration in general terms and noting any obvious mistakes. The Court designates a Reporter from amongst its Members who is charged with preparing a separate report. This report is submitted, along with the Counsel’s report and the draft Award, to one of the Court’s weekly Committee Sessions or, when the Awards involve large amounts in dispute, particularly complex or novel legal issues, state parties or dissenting opinions, to the Court’s monthly Plenary Sessions. The Court, after discussion, either accepts the award as submitted or decides to return it to the arbitral tribunal requiring modification as to the form and/or drawing the Tribunal’s attention to points of substance without affecting the latter’s freedom of decision.

62. Modification as to the form means that the award is approved only after the arbitral tribunal has made the required modifications. No award may be notified to the parties until the arbitral tribunal has made the formal modification laid down by the Court.

63. The Court does not have the power to require the arbitral tribunal to make changes to the substance of the draft award<sup>38</sup> but it may draw the tribunal’s attention to “points of substance”. For instance, it may draw its attention to the fact that an award contains reasons which contradict each other and could make it partly incomprehensible. The Court could also point out that the tribunal has ruled “*ultra petita*” i.e., it has decided on a point that did not form part of the claims or awarded amounts above those requested. It may further draw the arbitral tribunal’s attention to compulsory statutes of limitation in a given country which may affect the enforcement of the award. The arbitral tribunal is free to ignore the Court’s comments and the Court may not refuse to approve the draft award on this basis.

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36. Schäfer/Verbist/Imhoos “ICC Arbitration in Practice”, Chapter 3: The Rules pp. 123-125, *ICC Paris 2004*.

37. For a complete description of the scrutiny procedure see D.T. McGovern “Scrutiny of the Award by the ICC Court”, *The ICC International Court of Arbitration Bulletin Vol. 5/No. 1, May 1994 pp.46-47*.

38. Article 27 of the Rules.



64. The scrutiny process is designed to take approximately two weeks from the date the Secretariat receives the draft award. This time can vary depending on whether the draft award needs to be translated, whether it is to be submitted to a Committee or to Plenary Session, the condition of the draft and the responsiveness of the arbitral tribunal in making any requested changes.

*Its application to investment arbitration*

65. Although the International Court of Arbitration sees some investor-state disputes, these do not constitute the majority of its load. The question is whether it would be desirable to try to apply this system of scrutiny to a greater number of investment arbitration cases which fall mainly under ICSID and to a lesser extent to other arbitration institutions. It will not apply to *ad hoc* arbitration since scrutiny needs an institution.

66. As practiced in ICC, scrutiny requires an experienced and well-trained Secretariat and an independent, permanent judicial body – to mirror the Court of Arbitration. ICSID has an experienced Secretariat but lacks the judicial body to carry the scrutiny process forward. Any establishment of such a body would likely require the amendment of a set of ICSID Rules (Arbitration or Administrative Rules) and subsequently approval by the Administrative Council.

67. Although the OECD Investment Committee valued the merits of the procedure in the context of the ICC arbitration, considered that applying scrutiny to investment arbitration would require an important systemic change which was neither feasible nor justified under the circumstances.

**B. *The review of/ or comments by the disputing parties on draft awards***

68. The 2004 US Model BIT<sup>39</sup> and the US FTAs with Central America-Dominican Republic,<sup>40</sup> Chile<sup>41</sup> and Morocco,<sup>42</sup> under the heading “conduct of arbitration”, provide for a procedure of review/comment of the award by the disputing parties before it becomes final. According to this provision:

*“In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period”.*

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39. See *op. cit.* n. 26.

40. See *op. cit.* n. 27.

41. See *op. cit.* n. 23.

42. See *op. cit.* n. 25.

## II. MULTIPLE AND PARALLEL PROCEEDINGS – CONSOLIDATION OF CLAIMS

69. As a result of the larger number of BITs currently in place, and the increasing globalisation of production and investment, investors seeking to pursue claims for damages often have a choice of fora, i.e. either of different arbitration regimes or of arbitration or a national court. Corporations are reported to begin structuring their transactions in such a way as to be able to benefit from the provisions of different BITs. The “Czech cases”, (*CME/Lauder v. the Czech Republic*) and the approximately 40 cases currently pending against Argentina and arising from the same events demonstrate the increasing complexity of fora decisions.

70. Investors are sometimes able to claim breaches of different BITs and to seek relief through different arbitration proceedings under each of the invoked treaties in respect of a single investment and regarding the same facts, which could lead to parallel proceedings and potentially conflicting awards. This result is due to the fact that many, if not most BITs, protect not only investments made by nationals, individual and corporations of one state directly into the other state, but also investments made indirectly through a company established in one party but controlled by an investor in a non-party. Investors who are minority shareholders may be able to bring claims, too. A particular company may have minority shareholders of various nationalities. Hence, the host state may face multiple arbitrations under different BITs in relation to essentially the same set of facts. This section looks at issues related to forum shopping and multiple and parallel proceedings and at the consolidation of claims as a proposed avenue for the avoidance of possible inconsistent and conflicting awards emanating from the multiplicity of proceedings.

### II.1. Multiple proceedings

71. The most striking example of multiple proceedings emanating from the same single set of events by one government is the number of cases brought to ICSID against Argentina. There are approximately 40 ICSID proceedings today against Argentina. The vast majority were initiated in the months following the December 2001 devaluation of the Argentine peso. At that time, by a set of laws and decrees related to what Argentina has described as a public economic emergency and by amendment of the exchange rate system, Argentina ended the regime of convertibility and parity of the Argentine peso with the US dollar which had been in effect since 1991. The majority of the proceedings concern utilities and related service sectors (e.g. water, gas and energy distribution, telephone companies) and extractive industries sector (oil concessions). In the first award rendered *CMS Gas Transmission Company v. The Argentine Republic* (May 12, 2005),<sup>43</sup> the Tribunal dismissed CMS’s expropriation claim but upheld CMS’s claim for violations of fair and equitable treatment under Article II(2) of the Treaty and awarded compensation in the amount of \$133 million, plus interest. On 8 September 2005, Argentina filed for Annulment pursuant to Article 52 of the ICSID Convention based on two grounds:

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43. *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/08, Award, 12 May 2005.

that the Tribunal manifestly exceeded its powers [art. 52(1)(b)] and that the Awards failed to state the reasons on which it was based [art. 52(1)(e)].<sup>44</sup>

72. All the ICISD proceedings involving Argentina have been initiated on the basis of BITs concluded in the 1990s mainly with G7 countries but also with countries in Latin America, Eastern Europe, Africa and Asia. There is a legitimate concern that multiple cases brought against a single country based on a single measure could be a major source of inconsistent awards.

73. In recent arbitration cases a broad notion has been emerging of what constitutes an “investor” and “investment”. Foreign corporations frequently establish local ventures as indirect subsidiaries, incorporated in the Host state and held in a multi-tier arrangement. The tribunal in *CMS v. Argentina*<sup>45</sup> was the first to recognise that non-controlling minority shareholdings constitute an “investment” for purposes of the ICSID Convention and most BITs. Given the great number of non-controlling minority shareholders in each company, the risk of multiple proceedings over the same claim based on the same measures, is real.

74. In the *CMS v. Argentina* case, the CMS Gas Transition Company (“CMS”) purchased shares of an Argentine company, Transportadora de Gas del Norte (“TGN”), pursuant to Argentina’s privatization program in 1995. Argentina argued that CMS lacked standing to file its claim because it was merely a minority non-controlling shareholder and thus did not have standing to claim damages suffered by TGN.<sup>46</sup> The Tribunal ruled that the Convention did not require control over a locally-incorporated company in order to qualify under the Convention. It also ruled that the Convention does not bar a claim brought by a minority non-controlling shareholder such as CMS, observing that previous ICSID tribunals in also finding jurisdiction had “*not been concerned with the question of majority [ownership] or control but rather whether shareholders can claim independently from the corporate entity*”. The Tribunal answered this question in the affirmative.

75. In *Lanco v. Argentina*,<sup>47</sup> 18.3% shareholding was sufficient to find jurisdiction as an investment. The Tribunal noted that there was nothing in the Treaty that required an investor in the capital stock to have either control over the administration of a company, or a majority share, in order to qualify as an investor for the purposes of the Treaty.<sup>48</sup> The Tribunal further noted *inter alia* that *Lanco* was liable for all contractual obligations “*to the extent of its equity share*” and concluded that *Lanco* was a party to the Agreement “*in its own name and right*.”<sup>49</sup>

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44. *CMS Gas Transmission Company v. The Republic of Argentina*, Application for Annulment and Request for Stay of Enforcement of Arbitral Award, September 8, 2005.

45. *CMS Gas Transmission Company v. The Republic of Argentina* ICSID case No ARB/01/8, Decision on Objections to Jurisdiction, in 42 ILM 788 (2003) [www.asil.org/ilib/cms-argentina.pdf](http://www.asil.org/ilib/cms-argentina.pdf).

46. The only claim that it could make, argued Argentina, was one regarding direct damages to its shares in TGN (infringement of voting rights) not for its proportionate share of TGN’s damages. Because the ICSID Convention does not provide a definition of the term “investment”, the Tribunal analysed both the pre-Convention commentary on ownership of shares and a line of cases dealing with the issue of majority ownership of control. The Tribunal ruled that the Convention did not require control over a locally-incorporated company in order to qualify under the Convention.

47. *Lanco Int’l Inc. v. Argentina Republic*, Preliminary decision on jurisdiction, 40 I.L.M.457, 463 (2001).

48. *Ibid.* Sect. 10.

49. *Ibid.* Sect. 12, 14.

76. In *Azurix v. Argentina*,<sup>50</sup> the Tribunal found that “given the wide meaning of investment in the definition of Article., the provisions of the BIT [US-Argentina] protect indirect claims”. It cited the CMS Tribunals saying that “jurisdiction can be established under the terms of the specific provision of the BIT. Whether the protected investor is in addition a party to a concession agreement or license agreement with the host state is immaterial for the purpose of finding jurisdiction under those treaty provisions since there is a direct right of action of shareholder”.

77. In *Sempra v. Argentina*,<sup>51</sup> the Tribunal made findings in line with those cited above. Based on the definition of investment and investor in the US-Argentina BIT, it held that “there is no question that this is a broad definition, as its intent is to extend comprehensive protection to investors”.<sup>52</sup> It then referred to previous tribunals acting under both ICSID and UNCITRAL rules [the *Goetz*, *Enron*, *CMS* and *Enron (Additional Claim)* Tribunals] which have concluded that “in the light of the very terms of the provision, it [the definition] encompasses not only the majority shareholders but also the minority ones, whether they control the company or not”.<sup>53</sup> It finally concluded that “if the purpose of the Treaty and the terms of its provisions have the scope the parties negotiated and accepted, they could not now, as has been noted, be ignored by the Tribunal since that would void the Treaty of all useful effect”.<sup>54</sup>

78. In *Gas Natural SDG S.A. v. Argentina*,<sup>55</sup> Argentina also maintained that the claimant could not qualify as an investor under the BIT as it was only an indirect shareholder of the Argentine company. The Tribunal found that the claimant qualified within the definition of investment clearly stating that “assertion that a claimant under a Bilateral Investment Treaty lacked standing because it was only an indirect investor in the enterprise that had a contract with or a franchise from the state party to the BIT, has been made numerous times, never, so far as the Tribunal has been made aware, with success”. The Tribunal made clear that for example the *CMS v. Argentina* tribunal’s analysis “was very close to the analysis of the present Tribunal”.

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50. *Azurix Corp. v. Argentina*, ICSID case No ARB/01/12, decision on Jurisdiction, December 8, 2003.

51. *Sempra Energy International v. Argentina*, ICSID case No ARB/02/16, Decision on Objections to Jurisdiction, May 11, 2005. *Sempra*, participated in Argentina’s privatization of the gas sector, a program beginning in 1989. It owns 43.09% share capital of *Sodigas Sur S.A.* (“*Sodigas Sur*”) and *Sodigas Pampeana S.A.* (“*Sodigas Pampeana*”), Argentine companies that are licenses granted by Argentina to supply and distribute natural gas in several Argentine provinces. It maintained that the suspension of licensee companies’ tariff increases that were based on the U.S. producer index and the subsequent pesification of these tariffs pursuant to Law No. 25561, gave rise to a breach of investment protections afforded under the BIT.

52. *Ibid*, para 93.

53. *Idem*.

54. *Ibid*, para 94.

55. *Gas Natural SDG S.A. v. Argentina*, Decision of the Tribunal on Preliminary Questions on Jurisdiction Case No. ARB/03/10 June 17, 2005. *Gas Natural* is a corporation organized under Spanish law and has its principal place of business in Spain. In 1992, the claimant took part in a tender offer by the Argentine government as part of the privatization of its gas sector. It then participated in a consortium that purchased 70% of the shares of an Argentine corporation and formed an Argentine company. According to the claimant, it invested in Argentina in reliance on Law No.23, 928 and Decree 2/28 of 1991, which established the parity and convertibility of the Argentine peso with the U.S. dollar. The claimant alleged that the measures taken by the Argentine government pursuant to the emergency law breached the guarantees set forth in the BIT.

## II.2. Forum shopping and parallel proceedings

79. The process throughout which one of the parties to a dispute attempts to bring a claim before the forum most advantageous to him or her is referred to as “*forum shopping*”.<sup>56</sup> Forum shopping has long been a familiar concept in international private law and in many domestic law systems. A particular type of forum shopping can be found in international commercial disputes where parties can choose to pursue litigation before one out of several available jurisdictions.<sup>57,58</sup>

80. In the case of investment arbitration, “forum shopping” has a different meaning and application. On the one hand, the foreign investor is directed by the investment treaty to a specific arbitration option or set of options, i.e. local courts, ICISD arbitration or *ad hoc* arbitration. This creates an opportunity for forum shopping very different from the traditional private international law one: a forum shopping facility offered intentionally in favour of the investor.<sup>59</sup> On the other hand, a foreign investor and related parties may engage in forum shopping in combination with treaty shopping, to enlarge the choice of forum beyond the options provided by the specific BIT, or even to bring the same facts into parallel or multiple proceedings.<sup>60</sup>

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56. For the discussion on forum shopping in general see Yuval Shany “The Competing Jurisdictions of International Courts and Tribunals”, *Oxford University Press, International Court and Tribunal Series, 2003*; Andrew S Bell “Forum Shopping and Venue in Transnational Litigation”, *Oxford Private International Law Series, 2003* and William Park “International Forum Selection”, *Kluwer Law International, 1995*.

57. There have been different reactions to the phenomenon. Many civil law countries have opted for a restrictive definition of their courts’ jurisdiction, accepting it only if they have substantial links to the dispute – and the same requirement can be found under the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgements in Civil and Commercial Matters (the Brussels Convention). Certain jurisdictions provide that even when the court has jurisdiction to hear a dispute, it may decline jurisdiction if it considers that the authorities of another country are in a better position to decide (*forum non conveniens* doctrine). The international *lis pendens* rule also provides that a court may stay its ruling if another action between the same parties, based on the same facts and having the same object, is pending before a foreign authority.

58. According to B. Cremades and D. Cairns, “it seems likely that investor-State arbitral tribunals will have to develop doctrine similar to *lis pendens* and *forum non conveniens* to confront the issue [of duplication of claims and double recovery by investors] in the near future”. “The Brave New World of Global Arbitration” 3 *J. World Investment* 173 (2003).

59. E. Gaillard calls this “*forum shopping in favorem*” in “L’Arbitrage sur le fondement des traités de protection des investissements”, *Revue de l’Arbitrage* 2003, No. 3 p. 853-875.

60. The MAI Negotiating Group in its consideration of issues arising from the relationship between the MAI and other international agreements, including the WTO agreements, was focused on the avoidance of forum shopping, multiple procedures and contradictory awards. MAI negotiators expressed the view that it would be desirable to minimise forum shopping. The draft articles of the MAI reflected some initial judgements on how to address the issues of choice of forum. A provision was to preserve the MAI Party’s right to take to state-to-state arbitration a dispute which was subject to an investor-state proceeding. The text proposed to accept the possibility that a MAI Party might win a state-to-state award finding its measure was not a treaty violation, while it might lose on that point in an investor-state panel and be held to pay damages to the investor. MAI negotiators had treated this as acceptable and had insisted that the state-to-state award did not affect the validity of the investor to state award.

81. The most graphic examples of this phenomenon are the *CME/Lauder v. the Czech Republic* cases.<sup>61</sup> In these cases,<sup>62</sup> the Czech Republic was subject to two different UNCITRAL proceedings concerning certain governmental measures with regard to a local company that owned a TV license. The claims were brought almost simultaneously by the ultimate controlling shareholder, a US investor, Lauder, under the US-Czech Republic BIT in London and by a Dutch company, the CME Czech Republic, that hold shares in the local company under the Netherlands-Czech Republic BIT in Stockholm. The Czech Republic prevailed against Lauder, but was ordered to pay a substantial compensation to CME.

82. The Lauder Tribunal acknowledged the potential problem of conflicting awards, noting “*that damages [could] be concurrently granted by more than one court or arbitral tribunal...*” Nevertheless, it reasoned that “*the second deciding court or arbitral tribunal could take this fact into consideration when assessing the final damage*”.<sup>63</sup> The CME Tribunal addressed the ramifications of the parties’ parallel proceedings but found no bar to adjudicating the same dispute.<sup>64</sup>

*“The Czech Republic did not agree to consolidate the Treaty proceedings, a request raised by the Claimant (again) during these arbitration proceedings. The Czech government asserted the right to have each action determined independently and promptly. This has the consequence that there will be two awards on the same subject which may be consistent with each other or may differ. Should two different Treaties grant remedies to the respective claimants deriving from the same facts and circumstance, this does not deprive one of the claimants of jurisdiction, if jurisdiction is granted under the respective Treaty. A possible abuse by Mr. Lauder in pursuing his claim under the US Treaty as alleged by the Respondents does not affect jurisdiction in these arbitration proceedings”*.<sup>65</sup>

### II.3. Consolidation of claims

83. Consolidation of claims has often been applied in commercial arbitration, subject to the parties’ consent.<sup>66</sup> The need for consolidation arises when there are multiple arbitration proceedings filed with common questions of law or fact which raise the possibility of inconsistent or even conflicting awards.

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61. G. Sacerdoti notes that these cases represent the first instance of a major investment dispute arising under BITs being resolved in UNCITRAL arbitration (synonymous to international commercial arbitration). These arbitrations have evidenced a number of specific questions, if not problems, that may arise from the combination of BIT clauses of arbitration with recourse to standard international commercial arbitration. “Investment Arbitration under ICSID and UNCITRAL Rules: Prerequisites, Applicable Law, Review of Awards” in *19 ICSID Review--Foreign Investment Law Journal* 1(2004).

62. *CME (Netherlands) v. Czech Republic* (Partial Award) and *Lauder (US) v. Czech Republic* (Final Award) see *op. cit.* n. 28-29.

63. Para. 172 of the Award.

64. The CME Tribunal likewise rejected the Czech Republic’s argument that Mr. Lauder had impermissibly “treaty shopped”: “*The argument of abusive treaty shopping is not convincing. A party may seek its legal protection under any scheme provided by the laws of the host country. The Treaty, as well as the US Treaty, is part of the laws of the Czech Republic and neither of the treaties supersedes the other. Any overlapping of the results of parallel process must be dealt with on the level of loss and quantum but not on the level of breach of treaty*”. Para. 419 of the Award.

65. Para. 412.

66. E. Gaillard: “Consolidation of Arbitral Proceedings and Court Proceedings” in *Complex Arbitrations: Perspectives on their Procedural Implications, Special Supplement – ICC International Court of Arbitration Bulletin, December 2003 pp. 35-42*.

The *Lauder/CME v. the Czech Republic* cases might have reached a different result if they had been consolidated; in this case however one of the parties was unwilling to agree to consolidate the claims.<sup>67</sup>

#### A. *State practice and international rules*

84. The **UNCITRAL Rules**, the **ICSID Convention**, and the **Additional Facility Rules**, do not have any provision allowing for consolidation of claims. However, there have been some recent cases filed at ICSID in which the parties agreed to have their claims against a particular state consolidated. In order to avoid inconsistencies in the findings of different tribunals, parties could also appoint the same arbitrators. The **draft MAI**<sup>68</sup> had provided for consolidation of multiple proceedings in its Article 9 of the Chapter of Investor-State Procedures (see Annex).

85. The first multilateral agreement in force which provided for consolidation of claims was **NAFTA**. Its Article 1126 provides that where a Tribunal established under this Article is satisfied that claims submitted to arbitration have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order that the Tribunal assume jurisdiction over and hear and determine together, all or part of the claims; or assume jurisdiction over and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others<sup>69</sup> (see Annex).

86. Since NAFTA, provisions of consolidation have been included in investment chapters of Free Trade Agreements of all three NAFTA Parties, such as in **US FTAs with Chile**,<sup>70</sup> **Morocco**,<sup>71</sup> **Central America-Dominican Republic (CAFTA-DR)**<sup>72</sup> and in the **FTAs between Canada and Chile** (Article G-27)<sup>73</sup> and between **Mexico, Bolivia, and Costa Rica**.<sup>74</sup>

87. Consolidation provisions can be found for the first time in BITs in the new US Model BIT<sup>75</sup> as well as the new model Canada FIPA.<sup>76</sup> As is the case with NAFTA, these new model agreements

67. The *CME v. Czech Republic* Tribunal, in its Final Award ordering the Czech Republic to pay damages, reiterated the respondent's repeated rejection of CME's offer to structure the two cases so as to avoid potentially conflicting arbitral awards:

*"At the hearing the Respondent declined anew to accept any of the Claimant's alternative proposals...i) to have the two arbitrations consolidated into a single proceeding, ii) to have the same three arbitrators appointed for both proceedings, iii) to accept the Claimant's nomination in this proceeding of the same arbitrator that Mr. Lauder nominated in the London proceeding, iv) to agree that the parties to this arbitration are bound by the London Tribunal's determination as to whether there has been a Treaty breach, v) that after the submission of the parties' respective reply memorials and witness statements in this arbitration, the hearing be postponed until after the issuance of an award in the London Arbitration".*

68. DAF/MAI(98)7REV1 <http://www1.oecd.org/daf/mai/pdf/ng/ng987r1e.pdf>.

69. [http://www.dfait-maeci.gc.ca/nafta-alena/chap11-en.asp?#article\\_1125](http://www.dfait-maeci.gc.ca/nafta-alena/chap11-en.asp?#article_1125).

70. See *op. cit.* n. 23.

71. See *op. cit.* n. 25.

72. See *op. cit.* n. 27.

73. [www.dfait-maeci.gc.ca/tna-nac/cda-chile/chap-g26-en.asp#II](http://www.dfait-maeci.gc.ca/tna-nac/cda-chile/chap-g26-en.asp#II).

74. [www.sice.oas.org/cp\\_bits/english/fta\\_7c2e.asp](http://www.sice.oas.org/cp_bits/english/fta_7c2e.asp).

75. Article 33 in [www.state.gov/documents/organization/38710.pdf](http://www.state.gov/documents/organization/38710.pdf).

76. Article 32 in [www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf).

provide for consolidation upon request by a disputing party and not *ex officio* and concern multiple claims arising from the same facts, usually a state measure alleged to be in breach of the State's obligation.

## **B. Jurisprudence**

88. As mentioned above, in order to avoid inconsistencies in the findings of different tribunals, parties could also appoint the same arbitrators. This was done in the past, when two or three cases were brought by different investors against the same host State for similar actions taken by that State.<sup>77</sup> For instance, the ICSID Secretariat recommended such an action in the cases *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco*<sup>78</sup> and *Consortium R.F.C.C. v. Kingdom of Morocco*<sup>79</sup> based both on the same BIT between Italy and Morocco and on similar factual and legal backgrounds. Although the two procedures were conducted separately, the identical tribunal avoided issuing inconsistent decisions.<sup>80</sup>

89. In the context of the ICSID claims pending against Argentina a single Tribunal has been appointed to hear two independent claims. In March 2004 Sempra Energy International and Camuzzi International agreed to set up a single Tribunal to hear their claims registered within a three month time period and raised under two different BITs (US-Argentina for Sempra and Belgo-Luxembourg Economic Unit-Argentina for Camuzzi). The *Sempra Energy International v. Argentina*<sup>81</sup> and *Camuzzi International A.A. v. Argentina*<sup>82</sup> cases were heard by one Tribunal.<sup>83</sup> The same arbitrators have also been appointed to hear two disputes against Argentina involving electricity distribution companies in *Electricidad Argentina, S.A., & EDF International S.A. v. Argentina*<sup>84</sup> and *EDF International S.A., SAUR International S.A. & Léon Participations Argentinas S.A. v. Argentina*.<sup>85</sup> The same Tribunal was also constituted in three cases involving water services concessions: *Aguas Provinciales de Santa Fe, S.A.*,

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77. E. Obadia: "ICSID, Investment Treaties and Arbitration: Current and Emerging Issues" in *Investment Treaties and Arbitration, ASA Swiss Arbitration Association Conference on 25 January 2002*, pp.67-77.

78. *Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco* ICSID Case No. ARB/00/4 in 42 ILM 609 (2003).

79. *Consortium R.F.C.C. v. Kingdom of Morocco*, ICSID Case No ARB/00/6 in <http://www.worldbank.org/icsid/cases/rfcc-decision.pdf>.

80. Antonio Crivellaro "Consolidation of Arbitral and Court Proceedings in Investment Disputes", presented at the 24<sup>th</sup> Annual meeting of the ICC Institute of World Business Law, 15 November, Paris.

81. See *op. cit. n. 51*.

82. *Camuzzi International S.A. v. Argentina*, ICSID Case No ARB/03/2, Decision on Objection to Jurisdiction, May 11, 2005. Camuzzi has also raised a second claim in relation to its electricity distribution and transportation enterprise, *Camuzzi International S.A. v. Argentina* ICSID case No ARB/03/7; this claim is being heard by a different Tribunal, separately and independently of its other claim.

83. One arbitrator was appointed jointly by Sempra and Camuzzi, Argentina appointed the second arbitrator and the president of the tribunal was appointed by the Secretary General of ICSID. Other procedural matters also appear to have been agreed by the parties, including the time-table for submissions and, where appropriate, submission of consolidated pleadings, (Decision, paragraphs 9-14).

84. *Electricidad Argentina, S.A., & EDF International S.A. v. Argentina*, ICSID Case No ARB/03/22.

85. *EDF International S.A., SAUR International S.A. & Léon Participations Argentinas S.A. v. Argentina*, ICSID case No ARB/03/23. No procedural history of these two cases is available, thus the degree of integration and the procedures adopted, are, at present, unclear.



*Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic*,<sup>86</sup> *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic*<sup>87</sup> and *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic*.<sup>88</sup>

90. The first application of the NAFTA provision on consolidation was the consideration of a request by Mexico for consolidation of three claims by a Tribunal constituted to this effect.<sup>89</sup> Corn Products International, Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc., three US based companies, had submitted requests for institution of arbitration proceedings to ICSID against Mexico, for alleged breaches of NAFTA arising from the imposition of an excise tax on soft drinks containing high fructose corn syrup. A “Consolidation Tribunal” was constituted to rule upon Mexico’s request and decided against this consolidation in its Order of May 20<sup>th</sup>, 2005. It held that although there were some common questions of fact and law, there were several reasons to reject the claim: the direct and major competition between the claimants which would require complex confidentiality measures throughout the arbitration process and the numerous distinct issues of state responsibility and quantum.

91. On March 7, 2005, the United States with ICSID filed a request<sup>90</sup> pursuant to NAFTA Article 1126 to consolidate three cases: *Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America*, related to losses allegedly suffered as a result of certain U.S. antidumping, countervailing duty and material injury determinations on softwood lumber. The United States made this request “*in the interest of a fair and efficient resolution of those claims and to avoid the possibility of conflicting determinations*”, claiming that relevant issues of fact and law in the three notices of arbitration are nearly identical. A Tribunal was constituted to this effect and held its hearing on June 16, 2005.<sup>91</sup> On 7 September 2005, the Tribunal issued its Order<sup>92</sup> agreeing to the request of consolidation after having found that all four conditions of Article 1126(2) of the NAFTA were met. First, the claims in question had been submitted to arbitration under Article 1120; second, many questions of law and fact were common in the three Article 1120 arbitrations; third, the interests of fair and efficient resolution of the claims merit the assumption of jurisdiction over all of the claims; and fourth, the parties to the proceedings had been heard. It disagreed with the statements found in the *Corn Products* case related to the major competition among the claimants and the respect of confidentiality as the main impediments for such a consolidation.

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86. *Aguas Provinciales de Santa Fe, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Interagua Servicios Integrales de Agua, S.A. v. Argentine Republic* ICSID Case No ARB/03/17.

87. *Aguas Cordobesas, S.A., Suez, and Sociedad General de Aguas de Barcelona, S.A. v. Argentine Republic* ICSID Case No. ARB/03/18.

88. *Aguas Argentinas, S.A., Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic* ICSID Case No. ARB/03/19.

89. *Corn Products International, Inc. v. United Mexican States and Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States*, Order of the Consolidation Tribunal, May 20, 2005.

90. Request on consolidation by the United States, 7 March 2005:  
[www.state.gov/documents/organization/43492.pdf](http://www.state.gov/documents/organization/43492.pdf).

91. See transcript of the consolidation hearing: [www.state.gov/documents/organization/48508.pdf](http://www.state.gov/documents/organization/48508.pdf).

92. *Canfor Corp. v. United States of America, Terminal Forest Products Ltd. v. United States of America and Tembec Inc. et al. v. United States of America*, Order of the Consolidation Tribunal, 7 September 2007 at <http://naftaclaims.com/Disputes/USA/Softwood/Softwood-ConOrder.pdf>.

92. Introduction of consolidation provisions in existing BITs although desirable is not a realistic solution because it would require amending or renegotiating many BITs. Consolidation provisions could be envisaged, however, for new BITs coming up for review. In the meantime, disputing parties could take the initiative to ask for consolidation, and arbitral institutions such as ICSID could facilitate the process by appointing the same panel of arbitrators –which has already been done in some of the cases against Argentina. The OECD Investment Committee has agreed to examine further the rationale and merits of consolidation in investment arbitration and to conclude its discussions on this issue with a statement/recommendation on the subject.

### III. OTHER CHALLENGES OF JURISDICTIONAL NATURE: TREATY/CONTRACT CLAIMS

93. BITs establish a legal framework for the treatment and protection of foreign investment and investors and any claims arising from the treaty are treaty claims. Foreign investment also involves contracts between the investor and the host state or entities of the host state, for example in the form of concession contracts. Although the rights of the investor under each instrument are different, sometimes they may overlap. When a State-owned company breaches a contract concluded with a foreign investor – or when the host state breaches the contractual commitments assumed with a company in which a foreign investor has a stake, investors may have both contract and treaty claims against the host state. This has an impact on determinations of jurisdiction.

94. BITs define the parameters for the activities of tribunals in investor-state arbitration. Jurisdiction may be subject to certain procedural requirements: for instance, the competence of arbitral tribunals may depend on proceedings in the host state's domestic courts. The subject-matter jurisdiction of tribunals also varies, and may be described narrowly or more broadly: it may be limited to claims alleging a violation of BITs or it may include all investment disputes arising out of contracts.

95. In recent disputes, contract claims have been submitted to investment arbitration, through a BIT, even in the absence of a contractual clause providing for ICSID jurisdiction. This raises a number of questions: to what extent may an investor rely on treaty based protections under a BIT, but arising from contracts containing exclusive jurisdiction clauses in favour of a national court? Can the breach of a contractual provision amount to a breach of international law rights? How should tribunals apply the so-called “umbrella clauses” contained in some BITs, in which States promise to comply with all commitments and undertakings? These issues have been considered by a number of ICSID tribunals in recent times but without much uniformity in their approach.

#### III.1. Treaty jurisdiction despite the existence of a jurisdiction clause in a contractual agreement

96. The most direct precedents for allowing the investor to refer a contract dispute to an arbitral tribunal on the basis of a treaty despite the existence of a separate dispute settlement clause in the contract are the decisions on *Lanco v. Argentina*, *Salini v. Morocco* and *Vivendi v. Argentina*. More recent cases which drew from these are *Sempra Energy International v. Argentina*, *AES Corporation v. Argentina* and *Eureko B.V. v. Republic of Poland*.

97. In *Lanco v. Argentina*,<sup>93</sup> the tribunal held that the exclusive jurisdiction clause in favour of national courts did not prevent the submission of disputes to ICSID on two main grounds. The reasons were that, first, the wording of Art.26 of the Washington Convention is such that consent to ICSID arbitration is “to the exclusion of any other remedy” and second, since administrative jurisdiction cannot be selected by mutual agreement, the weight to be accorded to the contractual choice which the parties had made ought to be diminished.

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93. See op. cit. n. 47.

98. In *Salini v. Morocco*,<sup>94</sup> despite the existence of a jurisdiction clause in favour of the courts of Morocco, the Tribunal concluded that the investor-state dispute resolution provision in the relevant BIT overrode the contractual jurisdiction clause and “*obliges the State to respect the offer of jurisdiction in relation to violations of the BIT and any breach of a contract that binds the State directly*”. Negotiated by the Home state with the Host state, this solution renders this option a real substantive element of the protection offered to the foreign investor.<sup>95</sup>

99. The complexities of treaty/contract claims are very well illustrated in the *Vivendi* arbitration.<sup>96,97</sup> The choice of forum was also examined in an indirect way by the ICSID *Ad hoc* Committee in *Vivendi v. Argentina* (Annulment procedure).<sup>98</sup> The Committee faced with an exclusive jurisdiction clause and a BIT, distinguished between claims based on a breach of contract and claims based on a breach of a treaty. It concluded that BITs “*set an independent standard*” from that contained in contracts and a State could breach a treaty without breaching a contract and *vice versa*. Where the “*essential basis*” of a claim was contractual, then the exclusive jurisdiction clause would apply; when the claim were based on the breach of a treaty standard, then the jurisdictional provisions of the BIT could be invoked.<sup>99</sup>

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94. See *op. cit.* n 78.

95. E. Gaillard “La jurisprudence de CIRDI” p. 901, Pedone 2004. See also the analysis of all ICSID cases.

96. *Compania de Aguas des Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID case No. ARB/97/3 Award of 21 November 2000, in 40 ILM 426 (2001).

97. The case arose out of a long-term concession for the provision of water and sewage services in the Argentine Province of Tucumán. The concession services were provided by Compania de Aguas des Alconquija S.A. (CAA), an Argentine affiliate of Compagnie Générale des Eaux (predecessor to Vivendi). CAA and Vivendi alleged breaches of the 1991 Argentine-France BIT, committed both by the Tucumán authorities and by the Argentina federal authorities themselves. The Tribunal, at the jurisdictional phase, found that the dispute resolution provision of the Concession contract did not divest the Tribunal of jurisdiction “*if only because ex hypothesi, those claims are not based on the Concession Contract but allege a course of action under the BIT*”. On this, the Tribunal relied directly on the Preliminary Decision on jurisdiction in the *Lanco* case in which the ICSID Tribunal upheld the investor’s option to choose ICSID arbitration despite the existence of a contractual forum selection clause. However, even though the Tribunal found jurisdiction over all of Vivendi’s claims it decided not to reach the merits of those claims. Instead, it reasoned that the BIT claims were so interlinked with contract claims and questions of Argentine law that the case should be decided by the Tucumán courts. Vivendi requested an annulment of the case. The *Ad hoc* Committee upheld the Tribunal’s award on jurisdiction but annulled the award with respect to the claims of “*wrongdoing*” by the province of Tucumán on the basis that the Tribunal had manifestly exceeded its powers by failing to decide the “*Tucumán claims*” even though it had found that it had jurisdiction over them. For an analysis of the case, see: Stanimir Alexandrov “The *Vivendi* Annulment decision and the Lessons for Future ICSID Arbitrations – The Applicant’s Perspective” in “*Annulment of ICSID Awards*” see *op. cit.* n. 3. pp 83-104; also B. Cremades and D. Cairns in “Contract and Treaty Claims and Choice of Forum in Foreign Investment Disputes”, in *Arbitrating Foreign Disputes*, eds. Prof. N. Horn, Kluwer International (2004).

98. *Compania de Aguas des Aconquija S.A. and Vivendi Universal v. Argentine Republic*, ICSID case No. ARB/97/3, Decision on Annulment of 3 July 2002, 41 ILM 1135, p. 1156, paras. 102, 103.

99. The same reasoning was adopted by the Tribunal in the first ASEAN Investment Arbitral Award case, *Yaung Chi Oo Trading Pte. Ltd. V. Government of the Union of Myanmar*, which, though it did not retain jurisdiction, reiterated the previous findings establishing that, without prejudice to any forum-selection clause in the contract that refers purely contractual disputes to the courts of the host state, an arbitration may be initiated by an investor under an investment treaty regarding the international responsibility of the host state under the treaty. [ASEAN Case no. ARB/01/1, March 31, 2003, 42 ILM (May 2003), as

“...it is not open to an ICSID tribunal having jurisdiction under a BIT in respect of a claim based upon a substantive provision of that BIT, to dismiss the claim on the ground that it could or should have been dealt with by a national court...”

“...A state cannot rely on an exclusive jurisdiction clause in a contract to avoid the characterisation of its conduct as internationally unlawful under a treaty”.

“The claim was not simply reducible to so many civil or administrative law claims concerning so many individual acts alleged to violate the Concession Contract or the administrative law of Argentina. It was open to Claimants to claim, and they did claim, that these acts taken together, or some of them, amounted to a breach of articles 3 and/or 5 of the BIT”.<sup>100</sup>

100. In the *Sempra Energy International v. Argentina case*,<sup>101</sup> the Tribunal reviewed previous decisions which have dealt with this issue, in particular the one on annulment in *Vivendi* and concluded that it would not depart from the approach that “the claim is accordingly founded on both the contract and the Treaty, independently of the fact that purely contractual questions having no effect on the provisions of the Treaty can be subject to legal action available under the domestic law of the Argentine Republic”.<sup>102</sup>

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commented by E. Gaillard in “The First Association of Southeast Asian Nations Agreement Award” in *New York Law Journal*, 7 August, 2003]. Finally, in a recent case *PSEG Global Inc, The North American Coal Corporation, and Konya Ilgin Elektrik Uterim ve Ticaret Limited Sirketi v. Republic of Turkey*, the Tribunal referring to the previous cases and in particular to *Vivendi II*, rejected the argument that the Claimants had not resorted to previously agreed dispute settlement proceedings and pointed out that if the dispute was contract-based the choice of forum established in the contact would apply but if the dispute was treaty-based, a contractual dispute settlement procedure provision would not impede application of the treaty standard. However, if the dispute was both contract and treaty-based, then the dispute would be qualified as treaty-based (*PSEG Global Inc, The North American Coal Corporation, and Konya Ilgin Elektrik Uterim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID case No. ARB/02/5 Decision on Jurisdiction of 4 June, 2004.).

100. E. Gaillard in his comment on the *Lanco*, *Salini* and *Vivendi* cases notes that: “Although both awards [*Lanco* and *Salini*] held that all disputes relating to a violation of the international obligations of a state should be referred to the tribunal selected by the international treaty’s jurisdiction clause, both focused in part on the fact that the jurisdiction clauses contained in the litigious contractual agreements granted jurisdiction to local administrative courts which cannot ordinarily be selected or waived and thus seemed to imply that their selection in a jurisdiction clause could not constitute a real choice by the parties. The commitment in *Vivendi* eliminates this ambiguity its rationale being based solely on the distinction between the separate causes of action based on the contract, taken in isolation, and on the treaty, even where it encapsulates in turn a violation based on the contract. Thus the Annulment Committee’s decision rightly maintains that the same factual circumstances may constitute the basis of one claim relating to a contractual violation and of another relating to the international obligations of a state”. “*Vivendi* and Bilateral Investment Treaty Arbitrations” *New York Law Journal*, 6 February, 2003 also in “La jurisprudence de CIRDI”, see *op. cit.* n. 95.

101. See *op. cit.* n. 51.

102. *Idem* para 101.

### Box 1. Fork in the Road

BITs contain different provisions as for the relationship between international arbitration and domestic courts. Some BITs allow the investor to submit a dispute to arbitration after the dispute has been before the local courts or administrative tribunals for some fixed period of time, even if local courts have not concluded their proceedings<sup>1</sup>. Other BITs allow international arbitration provided no decision has been taken by domestic courts. The clear distinction between contract and treaty claims in order to determine the two types of litigation available for the same investment has an implication on the conditions of application of the "fork-in-the road" clause. These clauses aim at making irrevocable the choice of the investor who would have otherwise a generous choice of jurisdictions.<sup>2</sup> Not all investment agreements contain such a clause.

Investors are often involved in legal disputes which are of commercial or private law nature and may need to appear before a domestic court or an administrative tribunal. While these disputes may relate somehow to the investment, they are not "identical" to the investment dispute. This recourse to domestic courts does not necessarily reflect a choice which would preclude international arbitration. The emerging case law<sup>3</sup> related to the application of the "fork-in-the road" provision, is fairly consistent. This provision and the loss of access to international arbitration applies only if the same dispute between the same parties has been submitted to domestic courts or administrative tribunals of the host state before the resort to international arbitration.

**Waiver:** *NAFTA* does not include a "fork-in-the road" provision but a waiver. Its Article 1121 requires as "a condition precedent to submission of a claim to arbitration" that investors and, in certain circumstances enterprises owned or controlled by them: "...waive their right to initiate or continue before any administrative tribunal or court under the law of any Party, or other dispute settlement procedures, any proceedings with respect to the measure of the disputing Party that is alleged to be a breach...except for proceedings for injunctive, declaratory or other extraordinary relief, not involving the payment of damages, before an administrative tribunal or court under the law of the disputing Party"<sup>4</sup>. Similar language is included in the new model **US BIT**<sup>6</sup>, **US-Central America-Dominican Republic (CAFTA-DR) FTA**<sup>7</sup> **US-Chile FTA**<sup>8</sup> and the **US-Morocco FTA**<sup>9</sup>.

#### *Interim or Injunctive Relief*

An issue relating to "fork-in-the-road" concerns possible rights of recourse to interim or injunctive relief in order to prevent irreparable harm, i.e., to preserve property from dispersal or destruction, during the course of the dispute settlement proceedings. Even in cases where an investor must choose between pursuing international arbitration and domestic legal proceedings, provision could be made to protect investors' rights to interim or injunctive relief. This exception to the "fork in the road" rule would allow the investor to seek interim or injunctive relief under domestic procedures without foreclosing his right to initiate international arbitration. ICSID (article 47)<sup>10</sup> provides for the possibility of such relief as does the *NAFTA* (Article 1134)<sup>11</sup>, many BITs and did the draft MAI<sup>12</sup>.

#### Box Notes:

1. See Romania-Sri Lanka BIT, Argentina-Spain BIT, Article x(3)(a); on this see Emilio Augustin Maffezini. The Kingdom of Spain, Decision on Jurisdiction, 25 January 2000, 16 ICSID Review –F.I.L.J. 203(2001).
2. See France-Argentina BIT (Article 8.2):  
  
"2. If such dispute could not be solved within six months from the time it was stated by any of the parties concerned, it shall be submitted at the request of the investor: either to the national jurisdictions of the Contracting Party involved in the dispute; or to investment arbitration...Once an investor has submitted the dispute either to the jurisdictions of the Contracting Party involved or to international arbitration, the choice of one of the other of these procedures shall be final".
3. *Olguin v. Paraguay; Vivendi v. Argentina; Genin v. Estonia; Lauder v. the Czech Republic; Middle East Cement v. Egypt; CMS v. Argentina; Azurix v. Argentina and Enron v. Argentina*. For a more detailed and complete description of these cases and analysis of this provision see C. Schreuer "Travelling the BIT Route: of Waiting Periods, Umbrella Clauses and Forks in the Road" 5(2) *J. World Inv.* 231 (2004) pp.231-256.
4. According to C. Brower and J Sharp, "Article 1121 appears to eliminate one element of the CME problem, in that it precludes an investor like Lauder from bringing a NAFTA claim against one of the NAFTA Parties while he (or an enterprise that he "owns or controls", such as CME) simultaneously brings another claim arising from the same governmental 'measure' under a related contract or under a bilateral investment treaty. Of course, Article 1121 would not prevent a claimant from a non-NAFTA State Party from initiating an arbitration under a contract or bilateral investment treaty fro a claim arising from a governmental 'measure' that also gives rise to a NAFTA claim by another claimant from Canada, Mexico or the United States. Or as the

Tribunal in the Azinian case noted, jurisdiction in one forum does not 'exclude recourse to other courts or arbitral tribunals ...having jurisdiction on another foundation'. See op. cit. n. 4.

5. In the context of NAFTA, this issue was considered in *Waste Management Inc. v. United Mexican States*, where the claimant argued that the waiver required by NAFTA did not apply to Mexican proceedings "involving allegations that [Mexico] has violated duties imposed by other sources of law, including the municipal law of Mexico". The arbitral Tribunal rejected this argument, reasoning that "when both legal actions have a legal basis derived from the same measures, they can no longer continue simultaneously in light of the imminent risk that the claimant may obtain the double benefit in its claim for damages. This is what NAFTA Article 1121 seeks to avoid". The Tribunal dismissed the claim for lack of jurisdiction with one dissenting opinion. The claim was submitted for a second time to a new Tribunal two years later. The second Tribunal in this case stated: "Chapter 11 of NAFTA does not contain any express provision requiring a claimant to elect between a domestic claim and a NAFTA claim in respect of the same dispute. Such "fork in the road" provisions are not unusual in bilateral investment treaties, although their language varies..... Chapter 11 of NAFTA adopts a middle course. A disputing investor is evidently entitled to initiate or continue proceedings with respect to the measure in question before any administrative tribunal or court of the respondent State in accordance with its law, without prejudice to eventual recourse to international arbitration. It is only when submitting a claim under Article 1120 that the requirement of waiver arises'.
6. [Article 26 (2), (3)].
7. (Article 10.18).
8. (Article 10.17).
9. (Article 10.17).
10. Provisional measures: "Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party"
11. Interim measures of protection: "A Tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the Tribunal's jurisdiction. A Tribunal may not order attachment or enjoin the application of the measure alleged to constitute a breach referred to in Article 1116 and 1117. For purposes of this paragraph, an order includes a recommendation".
12. "An investor may seek interim relief, not involving the payment of damages, from the judicial or administrative tribunals of a Contracting Party, for the preservation of its rights and interests pending resolution of the dispute, without being deemed, thereby, to have submitted the dispute for resolution for purposes of subparagraph 4(b)"DAFFE/MAI/EG1(96)12 "Settlement of disputes between an investor and a contracting party".

101. In *AES Corporation v. The Argentine Republic*<sup>103</sup> the Tribunal was confronted with the same argument raised by Argentina and concurred with the position discussed above, already adopted by previous tribunals. The Tribunal distinguished between “two distinct legal orders: the international and the national one.” It held that exclusive jurisdiction of the national forum arose only within the Argentinean legal order and in relation to the execution of the contract but this did not preclude a claimant asserting its rights under two international treaties, the US-Argentina BIT and the ICSID Convention. To the extent that breaches of the concession contract also amounted to violations of Argentina’s international obligations under the BIT, the Tribunal could assert jurisdiction over these claims.

102. In *Eureko B.V. v. Republic of Poland*,<sup>104</sup> Poland contended that Eureko’s claims were inadmissible since they were predicated upon contractual claims. It relied on the terms of the Dutch-Poland BIT which provided that disputes concerning the BIT would be subject to the exclusive jurisdiction of a “Polish public court competent with respect to the Seller.” Referring, *inter alia*, to the decision of the *ad hoc* Committee in the *Vivendi* annulment decision, Poland also submitted that international law requires that the extent of the State’s contractual obligations must first be determined by the forum selected in the contract before a tribunal constituted pursuant to an investment treaty can consider whether the State breached its treaty obligations. The tribunal noted that the *Vivendi* annulment tribunal held that where “the fundamental basis of the claim’ is the treaty laying down an independent standard by which the conduct of the parties may be judged, the existence of an exclusive jurisdiction clause in a contract between the claimant and the respondent state...cannot operate as a bar to the application of the treaty standard. At most, it might be relevant...in assessing whether there has been a breach of the treaty.”<sup>105</sup> The tribunal found that the principle underlying the decision of the *ad hoc* committee in *Vivendi* required it to consider whether the facts of this case constituted breaches of the BIT.

### III.2. The umbrella clause

103. The extent of jurisdiction *rationae materiae* (subject matter) is not uniform under BITs. Some BITs cover only disputes relating to an “obligation under this agreement”, i.e. only for claims of BIT violations. Others extend the jurisdiction to “any dispute relating to investments”. The latter clause<sup>106</sup> creates an international law obligation that a host state shall, for example, “observe any obligation it may

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103. *AES Corporation v. The Argentine Republic*, ICSID Case ARB/02/17, Decision on Jurisdiction April 26, 2005 paragraphs 90-99.

104. *Eureko B.V. Poland*, Partial Award of an Ad Hoc Tribunal, 19 August 2005. Powszechny Zakład Ubezpieczeń (“PZU”) was a wholly state-owned, Polish insurance company. In 1999, the State Treasury of the Republic of Poland published an invitation for an international tender to sell 30% of the share capital of PZU. After negotiations, the State Treasury of the Republic of Poland selected Eureko B.V., (“Eureko”) a company incorporated in the Kingdom of the Netherlands, along with another buyer and entered into a share purchase agreement (“SPA”). Eureko claimed that within a few months following the execution of the SPA, there were several acts of political interference with the privatization that continued from 2000-2002, resulting in delays of the initial public offering. Eureko contended that as a result of its investment in PZU, it acquired rights that were entitled to protection by the Republic of Poland pursuant to the BIT, and such rights were frustrated by measures attributable to the Republic of Poland.

105. *Idem* para 101.

106. The clause often appears in BITs concluded by Germany, the Netherlands, Switzerland, the United Kingdom and the US (based on previous models). *Source UNCTAD “Bilateral Investment Treaties in the Mid-1990s”, 1998, p. 56.*



have entered to”; “constantly guarantee the observance of the commitments it has entered into”; “observe any obligation it has assumed”, and other formulations. These provisions are commonly called “umbrella clauses”,<sup>107</sup> although other formulations have also been used: “mirror effect”, “elevator”, “parallel effect”, “sanctity of contract” and “*pacta sunt servanda*”. Clauses of this kind have been added to provide additional protection to investors and are directed at covering investment agreements (including contracts) that host countries frequently conclude with foreign investors. Until the recent jurisprudence on the interpretation of the umbrella clause in the two *SGS Société Générale de Surveillance SA* cases, there seemed to exist a settled opinion on its meaning and scope. For a better understanding of the clause, a brief overview of its history as well as its interpretation by scholars and arbitral tribunals is necessary.

**a) History of the clause and investment agreements**

104. The first occurrence of the “umbrella clause”<sup>108</sup> as a distinct investment protection clause can be traced to the **1956-59 Abs Draft International Convention for the Mutual Protection of Private Property Rights in Foreign Countries** (the Abs draft) (article 4):<sup>109</sup>

*“In so far as better treatment is promised to non-nationals than to nationals either under intergovernmental or other agreements or by administrative decrees of one of the High contracting Parties, including most-favoured nation clauses, such promises shall prevail”.*

105. This approach was reformulated in the 1959 Abs-Shawcross Draft Convention on Foreign Investment (Article II):<sup>110</sup>

*“Each Party shall at all times ensure the observance of any undertakings which it may have given in relation to investments made by nationals of any other party”.*

106. The clause appeared right afterwards in the first **BIT between Germany and Pakistan** (Article 7):

*“Either Party shall observe any other obligation it may have entered into with regard to investments by nationals or companies of the other party”.*

107. The clause was also one of the core substantive rules of the **1967 OECD draft Convention on the Protection of Foreign Property** (Article 2)<sup>111</sup> which provided that:

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107. According to C. Schreuer, “they are often referred to as ‘umbrella clauses’ because they put contractual commitments under the BIT’s protective umbrella”, in “Travelling the BIT Route: of Waiting Periods, Umbrella clauses and Forks in The Road”, *J. World Inv* (2004) pp.231-256.

108. For a complete history of the umbrella clause see A. C. Sinclair: “The Origins of the Umbrella Clause in the International Law of Investment Protection”, *Arbitration International* 2004, Vol. 20, No 4, pp. 411-434. Sinclair’s research suggests that the origins can be traced to the advice provided by Sir Elihu Lauterpracht in 1953-1954 to the Anglo-Iranian Oil Company in connection with the settlement of the Iranian oil nationalisation dispute. The so-called “umbrella” or “parallel protection” treaty was again proposed in Lauterpracht’s advice given in 1956-57 to a group of oil companies contemplating a trunk pipeline from Iraq in the Persian Gulf through Syria and Turkey to the Eastern Mediterranean.

109. See H.J. Abs “Proposals for Improving the Protection of Private Foreign Investments”, In *Institut International d’Etudes Bancaires, Rotterdam, 1958* as cited by A. Sinclair *op. cit. n. 108*.

110. The text of the Abs-Shawcross Draft is reprinted in UNCTAD “International Investment Instruments: A Compendium in *United Nations, New York, 2000, Vol. V. p. 395*.

*“Each Party shall at all times ensure the observance of undertakings given by it in relation to property of nationals of any other Party”.*

108. The Notes and Commentaries accompanying the draft Convention describe this article as “an application of the general principle of *pacta sunt servanda*” in favour of the property of nationals of another party, and their lawful successors in title unless the undertaking expressly excludes such succession”. According to the Commentaries, “property” included but is not limited to investments which are defined in Article 9 as “all property, rights and interests whether held directly or indirectly, including the interest which a member of a company is deemed to have in the property of the company”. Property is to be understood “in the widest sense”.<sup>112</sup> However, the commentary limits the scope of Article 2 by insisting that undertakings “must relate to the property concerned; it is not sufficient if the link is incidental”.<sup>113</sup>

109. Following the OECD draft Convention, this clause found its way in the 1983, 1984 and 1987 **US Model BITs**:

*“Each Party shall observe any obligation it may have entered into with regard to investments”*<sup>114</sup>

and in many **UK BITs** as well, including its first with Egypt in 1975:

*“Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party”.*

110. The **draft MAI** text provided – in the Annex, listing negotiating proposals by two delegations, two formulations for a “respect clause”.<sup>115</sup>

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111. “Draft Convention on the protection of foreign property and Resolution of the Council of the OECD on the Draft Convention”, OECD Publication No 23081, November 1967.

112. For a detailed analysis of this provision and the Notes and Commentaries as well as related reactions by scholars, see A. Sinclair *op. cit. n.108* pp. 427-433.

113. Notes and Comments to Article 2, para. 3(a), see *op. cit. n. 111*.

114. US-Senegal BIT, US-Panama, US-Zaire BITs. See R.S. Gudgeon, “United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards” in *11 Int’l Tax and Bus. L.* 105 at 111 (1986).

115. The MAI Drafting Group considered the question of provisions which might be included in the MAI on investor rights arising from other agreements. Three broad conceptual approaches emerged. These were, in ascending order of ambition: (i) a “zero” option, i.e., no special provision in the MAI on rights under investor-state agreements; (ii) a procedural provision, i.e., a dispute settlement clause; or (iii) a substantive and procedural provision, i.e., a “respect clause”. The third approach was considered the most ambitious. It would make respect for such investor-state agreements into a MAI obligation, giving them substantive protection of the international law rule, *pacta sunt servanda*. Arguably, this could affect the defences of or damages owed by a government asserting rights to cancel or modify a contract for sovereign reasons or to change laws affecting an investment. It also has the following essential procedural effect: violations of the investor-state agreement would be subject to the full range of MAI dispute settlement mechanisms, including state-state consultations and arbitration. In such settlement, the issues would be considered in a broad context including both domestic and international law. The MAI Drafting Group considered that: “the second and third approaches would, in effect, amend investor-state agreements. They could introduce uncertainties about the law and remedies to be applied in case of dispute. They raise the questions of whether and how to draw a line between the kinds of agreements for

**Respect Clause:** “Each Contracting Party shall observe any obligation it has entered into with regard to a specific investment of an investor of another Contracting Party and,

**Substantive approach to the respect clause:** “Each contacting Party shall observe any other obligation in writing, it has assumed with regard to investments in its territory by investors of another Contracting Party. Disputes arising from such obligations shall only be settled under the terms of the contracts underlying the obligations”.

111. The *Energy Charter Treaty*<sup>116</sup> in the final sentence of Article 10(1) requires that:

“Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party”.<sup>117</sup>

**b) Literature**

112. The understanding of commentators and drafters on the umbrella clause provision in the draft OECD Convention was that while the clause probably did cover international obligations, its focus was contractual obligations accepted by the host state with regard to foreign property.<sup>118</sup>

113. Commenting on the same provision, **Brower**,<sup>119</sup> raised the possibility that the article’s scope *rationae materiae* may have been limited so as only “to apply specifically to large-scale investment and

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which the additional protection might be appropriate and those for which it might not, such as purely commercial bargains, or agreements settling tax or other administrative claims”. There was no consensus in the Group on the basic choice of approach. That choice may also be affected by outcome on a provision stating that the more favourable of the MAI or those investor-state agreements prevailed. If a decision is taken to pursue either the second (procedural) or third (substantive and procedural) approach, there would be subsidiary questions, the most important being scope of coverage. Should the provision apply broadly to all investor rights under investor-state agreements? If not, should it be limited by, for example, distinguishing between rights arising under essentially commercial agreements (presumably excluded) and those under which a state is acting as a sovereign (presumably covered) – a distinction which may be difficult to make in practice; or enumerating or defining categories of covered rights, such as those arising out of investment agreements and authorisations on which an investor has relied. The Group examined the strategic choices and issues thoroughly, in the time available, and clarified their implications. Given the range of views, the Group did not elaborate draft provisions for inclusion in the MAI. However, it agreed to provide the above mentioned provisions to aid in understanding the basic choices. These texts were not examined by the Group and did not represent specific recommendations. See “*Report of The Drafting Group Concerning the Protection of Investor Rights Arising from Other Agreements*”, DAF/MAI/DG1(96)REV1, 18 March 1996, in <http://www1.oecd.org/daf/mai/pdf/dg1/dg1961r1e.pdf>.

116. The Energy Charter Treaty was signed on 17 December 1994, available at <http://www.encharter.org>

117. The accompanying Secretariat document defines the scope of the provision as follows: “*Article 10(1) has the important effect that a breach of an individual investment contract by the host state country becomes a violation of the ECT. As a result, a foreign investor and its home country may invoke the dispute settlement mechanism of the Treaty*”, The Energy Charter Treaty: A Reader’s Guide, June 2002. p. 26.

118. See Sinclair *op. cit.* n. 108.

119. C.N. Brower, “The Future of Foreign Investment—Recent Developments in the International Law of Expropriation and Compensation” in V.S. Cameron (eds), *Private Investors Abroad – Problems and Solutions in International Business in 1975* (Southwestern Legal Foundation Symposium Series, Private Investors Abroad, Matthew Bender, New York, 1976), pp. 93, 105 n.27 as cited by A. Sinclair *op. cit.* n. 108.

concession contracts – in the making of which the state is deliberately ‘exercising its sovereignty’—and thus it might be argued that the ordinary commercial contracts is an implied exception to the general rule set forth in Article 2”.<sup>120</sup>

114. Today, it seems that a more consistent view emerges among commentators on the scope of the umbrella clause. *Prosper Weil* presented in his Hague lecture the idea that an investment treaty would transform a mere contractual obligation between state and investor into an international law obligation, in particular if the treaty included a clause obliging the state to respect such contract.<sup>121</sup>

115. *F. Mann* also was of the view that the umbrella clause in the BITS protects the investor against a mere breach of contract: “this is a provision of particular importance in that it protects the investor against any interference with his contractual rights, whether it results from a mere breach of contract or a legislative or administrative act, and independently of the question whether or no such interference amounts to expropriation. The variation of the terms of a contract or license by legislative measures, the termination of the contract or the failure to perform any of its terms, for instance, by non-payment, the dissolution of the local company with which the investor may have contracted and the transfer of its assets (with or without the liabilities) –these and similar acts the treaties render wrongful”.<sup>122</sup>

116. *Dolzer and Stevens* along the same lines state that: “these provisions seek to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. The provision is of particular importance because it protects the investor’s contractual rights against any interference which might be caused by either a simple breach of contract or by administrative or legislative acts and because it is not entirely clear under general international law whether such measures constitute breaches of an international obligation”.<sup>123</sup>

117. *E. Gaillard* notes that every time the State is engaged by a treaty to respect its contractual obligations towards foreign investors, the violation of the contract is also a violation of the treaty. These clauses could be qualified as “*clauses with a mirror effect*”. The treaty has in effect as a result to reflect

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120. Wälde notes that contracts related to investment – at this time seen in a much more narrow way as “foreign direct investment” than today – did by their very nature always involve a governmental dimension. Treaties at this time also only provided for state-to-state arbitration which was a screening mechanism against exorbitant and gratuitous use of treaties by private commercial operators. “The ‘Umbrella’ (or Sanctity of Contract/*Pacta Sunt Servanda*) Clause in Investment Arbitration: A Comment on Original Intentions and Recent Cases”, *Transnational Dispute Management, Volume 1 – Issue #04 – October 2004* (forthcoming 2005, *Arbitration International*).

121. « Il y a en effet, pas de difficultés particulières [en ce qui concerne la mise en jeu de la responsabilité contractuelle de l’Etat] lorsqu’ il existe entre l’Etat contractant et l’Etat national du co-contractant un traité de “couverture” qui fait de l’obligation d’exécuter le contrat une obligation internationale à la charge de l’Etat contractant envers l’Etat national du cocontractant. L’intervention du traité de couverture transforme les obligations contractuelles en obligations internationales et assure ainsi, comme on l’a dit, “l’intangibilité du contrat sous peine de violer le traité”; toute inexécution du contrat, serait-elle même régulière au regard du droit interne de l’Etat contractant, engage dès lors la responsabilité internationale de ce dernier envers l’Etat national du cocontractant » *Recueil des Cours III 1969 pp. 132 et seq.*

122. F.A. Mann “British Treaties for the Promotion and Protection of Investments”, *52 British Yearbook of International Law 241 (1981), at p. 246.*

123. R. Dolzer and M. Stevens “Bilateral Investment Treaties”, *Kluwer Law, 1995, pp. 81-82.*

at the level of international law what is analysed at the level of applicable private law as simple contractual violation.<sup>124</sup>

118. *UNCTAD's*<sup>125</sup> analysis of the provision is less categorical. It notes that “the language of the provision is so broad that it could be interpreted to cover all kinds of obligations, explicit or implied, contractual or non-contractual, undertaken with respect to investment generally. A provision of this kind might possibly alter the legal regime and make the agreement subject to the rules of international law”.

119. A middle approach is expressed by *T. Wälde*. He believes that the principle of international law would only protect breaches and interference with contracts made with government or subject to government powers, if the government exercised its particular sovereign prerogatives to escape from its contractual commitments or to interfere in a substantial way with such commitments. This would apply as well to contracts concluded only with private parties in the host state if such contracts are destroyed by government powers. “...If the core or centre of gravity of a dispute is not about the exercise of governmental powers ...but about “normal” contract disputes, then the BIT and the umbrella clause has no role”.<sup>126</sup>

120. A different view is expressed by *P. Mayer*, who maintains that the nature of the *inter pares* relationship remains unchanged and is subject to the *lex contractus* and that only the interstate relationship is subject to international law.<sup>127</sup>

### c) *Jurisprudence*

121. Although the umbrella clause has been a subject of scholarly discussion for some decades now, it has never been part of jurisprudence until very recently. The first ICSID case that addressed the umbrella clause arose in 1998: *Fedax NV v. Republic of Venezuela*<sup>128</sup> based on the BIT between the Netherlands and the Republic of Venezuela). In this case, the tribunal was unaware that there was an umbrella clause, and did not carry out any in-depth examination of the clause or its application. It simply applied its “plain meaning”, that commitments should be observed under the BIT, to the promissory note contractual document. It found that Venezuela was under the obligation to “*honor precisely the terms and conditions governing such investment, laid down mainly in Article 3 of the Agreement, as well as to honor the specific payments established in the promissory notes issued*”.<sup>129</sup> The merits of the case were partially settled by the parties.

122. The first time<sup>130</sup> an arbitral tribunal evaluated the scope of an umbrella clause was in the *SGS Société Générale de Surveillance, S.A. v. Pakistan* case,<sup>131</sup> (2003) based on the Pakistan-Switzerland

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124. « L'arbitrage sur le fondement des traités de protection des investissements », *Revue de l'Arbitrage* p. 868, note 43.

125. “Bilateral Investment Treaties in the mid-1990s” United Nations, 1998, p. 56.

126. *T. Wälde op. cit. n. 120*.

127. « La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat » *JDI*, 1986 pp. 36-37.

128. *Fedax NV v. Republic of Venezuela*, Award 9 March 1998, 37 ILM 1391 (1998).

129. *Id.* Paras 25, 29. (2002) 5 ICSID report 186 pp.

130. The first Energy Charter Treaty tribunal in *Nycomb v. Latvia* could have rendered its judgment on the basis of the ECT umbrella clause as was proposed by the claimant, but preferred to rest its decision on national treatment. By doing so, it avoided having to decide whether, in this case, the contract's jurisdictional clause in favour of domestic courts should be overridden by the ECT's arbitral jurisdiction. The existence and the potential scope of the clause was also addressed in *Salini Construttori S.P.A. and*

BIT. The Tribunal rejected SGS's contention that this clause elevated breaches of a contract to breaches of the treaty:

*"The text itself of Article 11 does not purport to state that breaches of contract alleged by an investor in relation to a contract it has concluded with a State (widely considered to be a matter of municipal rather than international law) are automatically 'elevated' to the level of breaches of international treaty law".*<sup>132</sup>

123. The Tribunal added that the legal consequences were so far-reaching in scope and so burdensome in their potential impact on the State that clear and convincing evidence of such an intention of the parties would have to be proved. Such proof was not brought forward according to the Tribunal.<sup>133</sup> It also argued that the claimant's interpretation "would amount to incorporating by reference an unlimited number of state contracts" the violation of which "would be treated as a breach of the treaty".<sup>134</sup>

124. At the same time, SGS brought another case against the Philippines,<sup>135</sup> based on the Philippines-Switzerland BIT.<sup>136</sup> The Tribunal in this case examined the interpretation of the clause in the SGS v. Pakistan decision and although it recognized that the language of the clause was not the same, it found the decision unconvincing<sup>137</sup> and highly restrictive.<sup>138</sup> It concluded that:

*"To summarise the Tribunal's conclusions on this point, Article X(2) makes it a breach of the BIT for the host State to fail to observe binding commitments, including contractual commitments, which it has assumed with regard to specific investments. But it does not convert the issue of the extent of content of such obligations into an issue of international law".*<sup>139</sup>

125. However, while the Tribunal took a wider reading of the scope of the umbrella clause, than the SGS v. Pakistan Tribunal, it required at the end that if the contract vests exclusive jurisdiction over disputes arising under its terms to another tribunal (domestic court or a contractual arbitral tribunal) then this tribunal has the key jurisdiction. The Tribunal decided to suspend the proceedings indefinitely until

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*Italstarde S.P.A. v. The Hashemite Kingdom of Jordan* under the Italy-Jordan BIT. The Tribunal considered the decisions of the SGS Tribunals on the umbrella clause but ultimately found that the language of the Italy-Jordan BIT did not include such a clause.

131. *SGS Société Générale de Surveillance, S.A. v. Pakistan*, ICSID case No ARB/01/13, decision on Jurisdiction, 6 August 2003, 18 ICSID rev- F.I.L.J. 307 (2003).

132. *Ibid* Para 166.

133. *Ibid* paras. 167 and 173.

134. *Ibid.* at para. 168.

135. *SGS Société Générale de Surveillance, S.A. v. the Republic of the Philippines*, ICSID case No. ARB/02/6, Decision on Jurisdiction, 29 January 2004 available at [www.worldbank.org/icsid/cases/SGSvPhil-final.pdf](http://www.worldbank.org/icsid/cases/SGSvPhil-final.pdf)

136. On both cases see the analysis by E. Gaillard *op. cit. n. 95*, C. Schreuer *op. cit. n. 107*, T. Wälde *op. cit. n.120*.

137. *Ibid.* at para. 125.

138. *Ibid.* at para. 119 and 120.

139. *Ibid.* para 128.

the claimant got a judgment from the domestic courts and then return to it if he considered that such judgment was not satisfactory.<sup>140</sup>

126. In *Waste Management v. United Mexican States*<sup>141</sup> the NAFTA Tribunal, expressed its view on the “umbrella clause” although NAFTA Chapter 11 does not contain such a clause. It observed that “NAFTA Chapter 11 – unlike many bilateral and regional investment treaties, does not provide jurisdiction in respect of breaches of investment contracts such as [the Concession Agreement]. Nor does it contain an ‘umbrella clause’ committing the host state to comply with its contractual commitments”.

127. Along the same lines, the Tribunal in *Conorzio Groupement L.E.S.I.-DIPENTA v. Republic of Algeria*,<sup>142</sup> although it held that the BIT between Italy and Algeria did not contain an umbrella clause, it stated that: “the effect of such clauses is to transform the violations of the State’s contractual commitments into violations of the treaty umbrella clause and by this to give jurisdiction to the Tribunal over the matter...”<sup>143</sup> [translation by the Secretariat].

128. The Tribunal in *Sempra Energy International v. Argentina*<sup>144</sup> noted that the dispute arose from “how the violation of contractual commitments with the licensees [Sempra] ...impacts the rights of the investor claims to have in the light of the provisions of the treaty and the guarantees on the basis of which it made the protected investment”<sup>145</sup>. It recognised that these contractual claims were also treaty claims and was reinforced in its view by the fact that “the Treaty also includes the specific guarantee of a general ‘umbrella clause’, [such as that of Article II(2)(c)], involving the obligation to observe contractual commitments concerning the investment, creates an even closer link between the contract, the context of the investment and the Treaty”.<sup>146</sup>

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140. Ibid. paras. 136-155 and 170-76. One of the three members of the Tribunal, Professor A. Crivellaro, dissented.

141. *Waste Management Inc. v. United Mexican States*, ICSID Case No ARB (AF)/00/3, Award, 30 April 2004, para 73. in [www.economia-snci.gob.mx/sphp\\_pages/importa/sol\\_contro/consultoria/Casos\\_Mexico/Waste\\_2\\_management/laudo/laudo\\_ingles.pdf](http://www.economia-snci.gob.mx/sphp_pages/importa/sol_contro/consultoria/Casos_Mexico/Waste_2_management/laudo/laudo_ingles.pdf).

142. *Conorzio Groupement L.E.S.I.-DIPENTA c. République algérienne démocratique et populaire*, ICSID case no ARB/03/08, Award, 10 January 2005, in <http://www.worldbank.org/icsid/cases/lesi-sentence-fr.pdf>.

143. *Idem* para 25(ii). “...Cette interprétation est confirmée *a contrario* par la rédaction qu l’on trouve dans d’autres traités. Certains traités contiennent en effet ce qu’il est convenu d’appeler des clauses de respect des engagements ou ‘umbrella clauses’. Ces clauses ont pour effet de transformer les violations des engagements contractuels de l’Etat en violations de cette disposition du traité et, par là même, de donner compétence au tribunal arbitral mis en place en application du traité pour en connaître...».

144. See *op. cit.* n. 51.

145. *Idem*, para 100.

146. *Idem*, para 101.

129. The Tribunal in *Joy Mining Machinery Limited v. The Arabic Republic of Egypt*<sup>147</sup> interpreted the “umbrella clause” as applying to violations of contract rights which by their magnitude are elevated into Treaty claims. It held that “[i]n this context, it could not be held that an umbrella clause inserted in the treaty, and not very prominently, could have the effect of transforming all contract disputes into investment disputes under the Treaty, unless of course there would be a clear violation of Treaty rights and obligations or a violation of contract rights of such a magnitude as to trigger the Treaty protection, which is not the case. The connection between the Contract and the Treaty is the missing link that prevents any such effect. This might be perfectly different in other cases where that link is found to exist, but certainly it is not the case here.”<sup>148</sup>

130. The Partial Award in *Eureko B. V. v. Poland*<sup>149</sup> examined the question of the “umbrella clause” included in the Netherlands-Poland BIT in great detail. It interpreted this provision according with its ordinary meaning as stipulated in Article 31, paragraph 1 of the Vienna Convention. It stated that “the plain meaning – the ‘ordinary’ meaning—of a provision prescribing that a State ‘shall observe any obligations it may have entered into’ with regard to certain foreign investments is not obscure. The phrase ‘shall observe’ is imperative and categorical. ‘Any’ obligations is capacious; it means not only obligations of a certain type, but ‘any’ – that is to say, all – obligations entered into with regards to investments of investors of the other Contracting Party”.<sup>150</sup> It therefore concluded that Eureko’s contractual arrangements with the Government of Poland were subject to the jurisdiction of the Tribunal.

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147. *Joy Mining Machinery Limited v. The Arabic Republic of Egypt*, Award on Jurisdiction, ICSID case No ARB/03/11, August 6, 2004. Joy Mining, a company incorporated under the laws of the United Kingdom initiated an ICSID arbitration pursuant to the UK-Egypt BIT. The dispute concerned a “Contract for the Provision of Longwall Mining Systems and Supporting Equipment for the Abu Tartur Phosphate Mining Project”, executed in April 1998 between Joy Mining and the General Organization for Industrial Projects of the Arab Republic of Egypt. The parties’ disagreement related to performance tests of the equipment and to the release of guarantees. The Tribunal addressed the issue of whether bank guarantees may be considered to be an investment under the BIT. Noting that bank guarantees are simply contingent liabilities, concluded that they could not constitute assets under the BIT and were not protected investments. In terms of the distinction between contractual disputes and investment disputes, the Tribunal held that “[i]n this context, it could not be held that an umbrella clause inserted in the treaty, and not very prominently, could have the effect of transforming.

148. *Idem* para 81.

149. *Eureko B.V. v. Poland*, Partial Award, 19 August 2005 can be found at <http://www.investmentclaims.com/decisions/Eureko-Poland-LiabilityAward.pdf>

150. *Idem* paragraph 246.



131. One analytical point in dispute before the tribunal in *Noble Ventures, Inc v. Romania*<sup>151</sup> was the question of whether contractual obligations also amounted to international obligations by virtue of the “umbrella clause” in the US-Romania BIT. The tribunal, in a thorough discussion on this clause found that, Article II(2)(c) of the BIT intended to create obligations and “*obviously obligations beyond those specified in other provisions of the BIT itself*” and by doing so it referred clearly to investment contracts. It also noted that such an interpretation was also supported by the object and the purpose rule; “any other interpretation would deprive *Article II(2)(c) of practical content, reference has necessarily to be made to the principle of effectiveness...*” On this point, it stated that “*a clause that is readily capable of being interpreted in this way and which would otherwise be deprived of practical applicability is naturally to be understood as protecting investors also with regard to contracts with the host State generally in so far as the contract was entered into with regard to an investment*”. It then added that by the negotiation of a bilateral investment treaty, two States may create an exception to the rules deriving from the autonomy of municipal law and “*in the interest of achieving the objects and goals of the treaty, the host state may incur international responsibility by reason of a breach of its contractual obligation...the breach of contract being thus ‘internationalised’, i.e. assimilated to a breach of a treaty*”. The “umbrella clause” introduces this exception.

132. Although the decisions above do not all reach the same conclusion on the interpretation of the “umbrella clause”--due in part to the different language included in the treaties under examination – it seems that there is a growing consistency on the interpretation of its meaning to include “all obligations” by the State, both treaty and contractual. The OECD Investment Committee agreed to study further the meaning of this clause in particular by taking stock of the specific language included in a number of BITs.

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151. *Noble Ventures, Inc. v. Romania*, Award October 12, 2005 ICSID Case No ARB/ 01/11 The decision concerns a dispute between a U.S. company, Noble Ventures, Inc. (“the claimant”) and Romania arising out of a privatization agreement concerning the acquisition, management and operation of a Romanian steel mill, Combinatul Siderurgic Resita (“CSR”) and other associated assets. The privatization agreement was entered into between the claimant and the Romanian State Ownership Fund (“SOF”). Noble Ventures paid SOF the initial instalment of the purchase price and SOF transferred to Noble Ventures its shares of CSR, comprising almost all of CSR’s equity share capital. Noble Ventures alleged, *inter alia*, that Romania failed to honour the terms of several agreements related to the control of CSR, that Romania misrepresented CSR’s assets in the tender book prepared for the privatization, that Romania failed to carry out its obligation to negotiate debt rescheduling with state budgetary creditors in good faith, that Romania failed to provide full protection and security to its investment during a period of labour unrest in 2001, and that Romania’s initiation of insolvency proceedings were in bad faith, in violation of fair and equitable treatment, and tantamount to expropriation.

## ANNEX. CONSOLIDATION

### Draft MAI

#### 9. *Consolidation of Multiple Proceedings*

a. In the event that two or more disputes submitted to arbitration with a Contracting Party under paragraph 2.c have a question of law or fact in common, the Contracting Party may submit to a separate arbitral tribunal, established under this paragraph, a request for the consolidated consideration of all or part of them. The request shall stipulate:

1. the names and addresses of the parties to the proceedings sought to be consolidated,
2. the scope of the consolidation sought, and
3. the grounds for the request.

The Contracting Party shall deliver the request to each investor party to the proceedings sought to be consolidated and a copy of the request to the Parties Group.

b. The request for consolidated consideration shall be submitted to arbitration under the rules chosen by agreement of the investor parties from the list contained in paragraph 2.c. The investor parties shall act as one side for the purpose of the formation of the tribunal.

c. If the investor parties have not agreed upon a means of arbitration and the nomination of an arbitrator within 30 days after the date of receipt of the request for consolidated consideration by the last investor to receive it:

1. the request shall be submitted to arbitration in accordance with this article under the UNCITRAL rules, and
2. the appointing authority shall appoint the entire arbitral tribunal, in accordance with paragraph 7.

d. The arbitral tribunal shall assume jurisdiction over all or part of the disputes and the other arbitral proceedings shall be stayed or adjourned, as appropriate if, after considering the views of the parties, it decides that to do so would best serve the interest of fair and efficient resolution of the disputes and that the disputes fall within the scope of this paragraph.

e. An investor may withdraw the dispute from arbitration under this paragraph 9 and such dispute may not be resubmitted to arbitration under paragraph 2.c. If it does so no later than 15 days after receipt of notice of consolidation, its earlier submission of the dispute to that arbitration shall be without prejudice to the investor's recourse to dispute settlement other than under paragraph 2.c.

f. At the request of the Contracting Party, the arbitral tribunal established under this paragraph may decide, on the same basis and with the same effect as under paragraph 9.d, whether to assume

jurisdiction over all or part of a dispute falling within the scope of paragraph 9.a which is submitted to arbitration after the initiation of consolidation proceedings.

## NAFTA

### *Article 1126: Consolidation*

1. A Tribunal established under this Article shall be established under the UNCITRAL Arbitration Rules, and shall conduct its proceedings in accordance with those Rules, except as modified by this Subchapter.

2. Where a Tribunal established under this Article is satisfied that claims have been submitted to arbitration under Article 1120 that have a question of law or fact in common, the Tribunal may, in the interests of fair and efficient resolution of the claims, and after hearing the disputing parties, order that the Tribunal:

- (a) shall assume jurisdiction over, and hear and determine together, all or part of the claims; or
- (b) shall assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others.

3. A disputing party that seeks an order under paragraph 2 shall request the Secretary-General of ICSID to establish a Tribunal and shall specify in the request:

- (a) the name of the disputing Party or disputing parties against which the order is sought;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

4. The disputing party shall give to the disputing Party or disputing parties against which the order is sought a copy of the request.

5. Within 60 days of receipt of the request, the Secretary-General of ICSID shall establish a Tribunal consisting of three arbitrators. The Secretary-General shall appoint the presiding arbitrator from the roster described in paragraph 4 of Article 1124. In the event that no such presiding arbitrator is available to serve, the Secretary-General shall appoint a presiding arbitrator, who is not a national of any of the Parties, from the ICSID Panel of Arbitrators. The Secretary-General shall appoint the two other members from the roster described in paragraph 4 of Article 1124, and to the extent not available from that roster, from the ICSID Panel of Arbitrators, and to the extent not available from that panel, in the discretion of the Secretary-General. One member shall be a national of the disputing Party and one member shall be a national of the Party of the disputing investors.

6. Where a Tribunal has been established under this Article, a disputing party that has not been named in a request made under paragraph 3 may make a written request to the Tribunal that it be included in an order made under paragraph 2, and shall specify in the request:

- (a) the party's name and address;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

7. A disputing party described in paragraph 6 shall give a copy of its request to the parties named in a request made under paragraph 3.
8. A Tribunal established under Article 1120 shall not have jurisdiction to decide a claim, or a part of a claim, over which a Tribunal established under this Article has assumed jurisdiction.
9. A disputing Party shall give to the Secretariat of the Commission, within 15 days of receipt by the disputing Party, a copy of:
  - (a) a request for arbitration made under paragraph 1 of Article 36 of the ICSID Convention;
  - (b) a notice for arbitration made under Article 2 of the Additional Facility Rules; or
  - (c) a notice of arbitration given under the UNCITRAL Arbitration Rules.
10. A disputing Party shall give to the Secretariat of the Commission a copy of a request made under paragraph 3 of this Article:
  - (a) within 15 days of receipt of the request, in the case of a request made by a disputing investor;
  - (b) within 15 days of making the request, in the case of a request made by the disputing Party.
11. A disputing Party shall give to the Secretariat of the Commission a copy of a request made under paragraph 6 of this Article within 15 days of receipt of the request.
12. The Secretariat of the Commission shall maintain a public register consisting of the documents referred to in paragraphs 9, 10 and 11.